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CURRENT EVENTS.

THE JUDICIAL MIND.—It is usually said in compliment to judges and others eminent in the legal profession that they have "judicial minds." This expression means that they have, in a high degree, the capacity to see and appreciate the merits of both sides of a question or controversy, can deal out equal and even-handed justice to each, and manifest in their judgments and action a clear and keen sense of right. Such men are the opposites of that class of persons who, however gifted by nature or enriched by the endowments of education, are, nevertheless, born partizans, who, upon the first presentation of a question, espouse with ardor one side of it, ignoring the facts and contemning the reasoning which tend to sustain the other.

In all ages and in every land the capacity to do full and equal justice between contending parties has been regarded as the most important and essential element of the judicial character, and the unjust judge "who feareth not God nor regarded man" is considered the worst of civil and social oppressors. We are happy in the belief that the unjust judge, consciously and wilfully unjust, is rare, if not unknown, in our country, yet such is the infirmity of human nature that disastrous consequences often result from the rulings of judges, deficient in this leading essential of their official character, who, meaning to do well and trying to do right, are utterly unable to mete out justice upon particular subjects or between certain classes of persons. It is often said, not always with ill-nature, that certain judges are, in criminal cases, "harsh, severe, rigid," or, on the other hand, that they are "easy or lenient," and these expressions indicate that these judges are, in popular estimation at least, deficient in that quality which constitutes the chief glory of their office.

On the civil side of the courts, the defect we have indicated is equally apparent. Whenever such expressions are used as "prepossessions," "predilections," the "tendency of the courts," etc., we may well suspect that the court has failed to hold the balance of justice precisely even.

In saying this we must not be understood as reflecting in any degree upon the motives of judges concerning whom remarks of this description are made, or to impute to them anything worse than the fallibility common to our race. The mind, even the judicial mind, will, upon some subjects, run into grooves, and they will deepen into ruts and even into gullies, from which extrication is difficult, if not impossible. Into this predicament we think our courts have fallen upon several subjects.

We do not, of course, presume to dictate, or even to suggest to judges of eminence, any reconsideration of fixed opinions or any emendation of their mental processes, but merely express our opinion that on all subjects on which there exists, in the judicial mind, a "prepossession" or "a predilection" or "a tendency," there is abundant occasion for the exercise of special caution.

The judicial mind, as we have defined it—the capacity to see both sides of a question and to do equal justice to each—is even more important to the practitioner than to the court. If a trial judge lacks discrimination or has a peculiar prepossession, or, as it is sometimes called, "a leaning" on a particular subject, and errs in consequence, his error will probably be corrected, at some cost, certainly, upon appeal, but if a practitioner becomes possessed by the idea that he and his client are undoubtedly in the right, and shuts his eyes and stops his ears to every thing that can be said or written to the contrary, and goes into trial imperfectly prepared in consequence, he may very probably come to grief and his mistake prove irremediable. In this matter the client also is apt to make a serious mistake. To an anxious litigant nothing can be more grateful than the hearty espousal of his cause and a sincere faith in its justice. But if, through over-confidence, false hopes are raised and opportunities for defense or successful assaults are neglected, he is not much comforted, if adverse fortune overtakes him, by the reflection that his counsel feels a pang as keen as his own. He will then learn, when it is too late, that cool, impartial judgment is of more worth than the ardor of partisanship, and that to accurately

estimate one's own chances an accurate estimate of the adverse forces is essential. There is no rule of practice more worthy of universal acceptations than that a lawyer should study his adversary's side of the question even more assiduously than he does his own case; he should endeavor to anticipate every point that can possibly be made by his opponent, and carefully prepare himself to refute it, and especially should he resist the temptation which so easily besets a sanguine and zealous man to underrate an adverse argument, saying that it "amounts to nothing," when in fact it may amount to a great deal. In short, and finally, an advocate should have the same judicial mind, the same capacity to see both sides of a question, and to appreciate the merits of each that appertains to the bench, and unless he does possess this capacity he lacks an important element of success in his profession.

AMERICAN BAR ASSOCIATION.—On another page of this number[1] will be found a list of the principal officers of the American Bar Association for 1888-1889, elected at the recent meeting of that body, held at Saratoga Springs in August last, including president, secretary, treasurer, the vice-presidents for the several States and the chairman of the standing and special committees.

We publish this list, thinking that it would be convenient for reference to many of our subscribers.

[1] *Post*, p. 439.

NOTES OF RECENT DECISIONS.

ELECTIONS AND VOTERS—QUALIFICATION OF VOTERS—MORMONS — CONSTITUTIONAL LAW—LEGISLATIVE POWERS.—We are not a little surprised to see that in a recent case[1] the Supreme Court of Nevada has found it necessary to decide that, under the constitution of that State, the legislature has no power to prescribe a religious text as a qualification of voters. The statute of that State, which in the case above referred to is declared unconstitutional, prescribes that in order to be qualified as a voter any person offering himself as such may be required to take an oath that he is not a member of the Morman church. The facts were, that the relator applied for registration as a voter under the registration laws of the State, and was refused registration because he was unwilling to take the oath prescribed by the act of 1887, which required that the applicant should swear that he was not a member of the "Church of Jesus Christ of Latter Day Saints, commonly called the Morman church." The party, when so refused registration as a voter, applied for a writ of *mandamus*, directed to the proper officer, requiring him to register the relator as a voter. The case was heard upon this question, and the court held that the *mandamus* should issue as prayed for; that the act of 1887 was in conflict with that provision of the constitution which prescribed the qualification of voters, and the act was not authorized by article 2, section 6, of the constitution which empowered the legislature to provide by law suitable regulations for the registration of voters. The court says: "The right of suffrage, as conferred by the constitution, is beyond the reach of any such interference. It cannot be changed except by the power that established it, viz.: the people in their direct sovereign capacity."[2]

The court adds: "It attempts to disfranchise those who are enfranchised by the fundamental law of the commonwealth, and it enacts what shall be the evidence of disfranchisement. It is not, it does not profess to be a regulation of the mode of exercise of the right to an elective franchise. It is a deprivation of the right itself. Can, then, the legislature take away from an elector his right to vote, while he possesses all the qualifications required by the constitution? This is the question now before us. When a citizen goes to the polls on an election day with the constitution in his hand, and presents it as giving him a right to vote, can he be told, true, you have every qualification that instrument requires. It declares you entitled to the right of an elector, but an act of

[1] State v. Findley (S. C. Nev., Oct. 8, 1888), 19 Pac. Rep. 241.

[2] McCafferty v. Guyer, 59 Pa. St. 111; Davis v. McKeeby, 5 Nev. 369; Clayton v. Harris, 7 Nev. 64; State v. Williams, 5 Wis. 308; State v. Baker, 38 Wis. 86; Quinn v. State, 35 Ind. 490; Monroe v. Collins, 17 Ohio St. 685; Kinneen v. Wells, 144 Mass. 497, 11 N. E. Rep. 916; Rison v. Farr, 24 Ark. 162; State v. Canaday, 73 N. Car. 222.

assembly forbids your vote, and, therefore, it cannot be received. If so, the legislative power is superior to the organic law of the State, and the legislature, instead of being controlled by it, may mould the constitution at their pleasure. Such is not the law. The legislature may adopt such rules and prescribe such oaths as may be deemed necessary to test the qualifications of an elector. It also has the power to adopt such reasonable regulations of the constitutional rights of a voter as may be deemed necessary to preserve order at elections, to guard against fraud, undue influence or oppression, and to preserve the purity of the ballot. All regulations of the elective franchise, however, must be reasonable, uniform and impartial. They must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void."[3]

The legislature of Nevada seems to have had, in enacting the statute of 1887, the same exalted idea of its dignity and authority which possessed the Ohio legislature in granting special privileges to limited localities under the guise of general laws, upon which we commented in a former number.[4] It is gratifying to find that the Supreme Court of Nevada has put the seal of reprobation upon such inconstitutional practices.

[3] Cooley, Const. Lim. 758; Daggett v. Hudson, 43 Ohio St. 548, 3 N. E. Rep. 538; State v. Butts, 31 Kan. 554, 2 Pac. Rep. 618; Capen v. Foster, 12 Pick. 488; Page v. Allen, 58 Pa. St. 346, 347; McMahon v. Mayor, 66 Ga. 224.

[4] *Ante*, p. 81.

LIMITATION OF ACTION—STATUTE—TROVER AND CONVERSION—BAILMENT.—The Supreme Court of Iowa has recently decided a case[1] involving the question, when the statute of limitations begins to run in favor of a bailee of personal property. The facts were, that in the year 1877 the plaintiff delivered a gold watch to the defendant for repairs, and the watch remained in his hands for nearly or quite ten years, there having been within that period many conversations between the parties with reference to the watch, defendant wishing to buy it. In 1887 demand was made by the plaintiff for the watch, which defendant refused to deliver, and thereupon plaintiff instituted an action of trover for the conversion of the watch. Defendant demurred to the complaint on the ground of the statute of limitations, and the trial court sustained the demurrer. Upon appeal a different view was taken and the judgment of the trial court reversed. In rendering this judgment the court states the law thus:

"It is claimed in behalf of the appellee that the statute commenced to run at the time the deposit was made, and that a demand of the watch not having been made within five years from the deposit, the action is barred. In other words, the claim is that no action can be maintained because demand was not made within five years after the inception of the relation of bailor and bailee between the parties. It is a general rule that a party cannot prevent the running of the statute of limitations by omitting to do some act which he might have done, or which he is required by law to do. A party, having a claim for money against a county, cannot extend the time for commencing the action by failing to present his claim to the board of supervisors.[2] The same rule applies to promissory notes payable on demand. And, generally, where a right of action depends upon a demand, such demand must be made within the period prescribed by the statute of limitation.[3] This is the rule as to actions arising upon contracts, express or implied.[4] In Codman v. Rogers, it is held that the statute will not begin to run until demand, yet, unless demand be made in a reasonable time, the plaintiff will not be entitled to relief; and a reasonable period of time is determined by the circumstances; and where no cause for delay is shown, the time is to be fixed by the statute of limitations. But the action in this case is in the nature of an action for a tort. It is not grounded upon an agreement to pay money for the watch on demand for the money. The defendant was engaged in the business of a jeweler and repairer of watches. It is alleged in the petition that the watch is very valuable, and worth some $325, and that

[1] Reizenstein v. Marquardt (S. C. Iowa, Oct. 2, 1888), 39 N. W. Rep. 506.

[2] Baker v. Johnson Co., 33 Iowa, 155.

[3] Ball v. Railway Co., 62 Iowa, 753, 16 N. W. Rep. 592.

[4] Thrall v. Mead, 40 Vt. 450; Codman v. Rogers, 10 Pick. 112; Palmer v. Palmer, 36 Mich. 488; Jameson v. Jameson, 72 Mo. 640.

after it was repaired it was left with the defendant for safe-keeping. It was not contemplated by the parties that a demand would be made immediately. If such had been the intention, it would not have been deposited for safe-keeping. No right of action accrued until there was a wrongful conversion of the property. The rights and obligations of a bailee of personal property are very much like those of a trustee of a resulting trust in realty, and it has always been held that the statute of limitations commences to run in favor of a trustee from the time when he denies the trust and claims the trust property as his own.[5] Upon the same principle the statute of limitations will not begin to run in favor of a bailee until he denies the bailment and converts the property to his own use. And the refusal to deliver the property on demand is a conversion. In our opinion, the demurrer to the petition should have been overruled."

[5] Peters v. Jones, 35 Iowa, 512; Gebhart v. Sattler, 40 Iowa, 152.

INTERSTATE GARNISHMENT.

Great corporations have multiplied within the past few years with incredible rapidity, and do business in many States. This is especially so concerning railroad corporations which ramify throughout the country. In States where they do not enter they often have agents to look after their interests. Most of the States impose the same duties upon foreign corporations as upon domestic. It is reasonable to suppose that if foreign corporations have the same rights, privileges and immunities as enjoyed by domestic, they should be compelled to assume the same burdens and liabilities. A corporation is an artificial person, and in the pursuit of its legitimate business, unless it has express exemptions, must conform to the same regulations that control natural persons.

This principle is exemplified in an Illinois case.[1] An attachment was brought by a resident of Illinois before a justice of the peace in Adams county, against a non-resident, or a resident of Missouri. No property of the defendant being found, the Hannibal & St. Joe Railroad Company was summoned as a garnishee, and judgment was rendered against the company. The railroad company appealed to the circuit court, the appellate court and then to the supreme court, the judgment each time being affirmed. This railroad company was chartered in Missouri. had its principal office in that State, and its tracks were wholly within that State. But the company ran its trains regularly into the city of Quincy, Adams county, Illinois, at which city it had an agent who received passengers and freight for transportation over said railroad, and the company had personal property, such as engines and cars, in that city. On the trial the company admitted its indebtedness to the defendant in the suit, but denied that it held any property of his in possession or under its control. The question was presented, whether a corporation of another State, doing business and having property in Illinois, may be garnished for a debt it owes to a resident of the State of its own domicile, in the courts of Illinois? The corporation and the defendant in the suit were both non-residents of Illinois. The court held that this corporation must be treated the same as a natural person placed in the same situation, who would certainly be liable to garnishment on a fair construction of the Illinois statute, and also on precedents giving interpretation to substantially the same kind of statutes of other States that its doing business and having property in Illinois make it liable to garnishment the same as a domestic corporation, and service of process may rightfully be made on its agent in Illinois; that a debt due from a foreign corporation to one of its employees residing in the same State, payable by its treasurer, is not local, nor is the action to recover on the same a local action, to be brought in the State of the corporation's domicile. The court say: "If a foreign corporation is so far an inhabitant in a State into which it comes as to transact its business, it should be so far held an inhabitant as to be sued and served with process on the officer who transacts its business, and the statute has so provided. Section 26, ch. 32, Rev. Stat. 1874, entitled 'corporations,' subjects foreign corporations to all of the liabilities, restrictions and duties that are imposed upon like corporations of this State. One of the liabilities of corpora-

[1] Railroad Co. v. Crane, 102 Ill. 249.

tions organized under the laws of this State is, to be sued by service on an officer or agent, and if the liability of foreign bodies is in all respects the same, then they may be sued and served with process in the same manner." This being the law, foreign corporations are under the same liabilities as domestic which may be garnished,[2] and the process may be served on an officer or an agent transacting the company's business. The legislature has power to subject foreign corporations to the same liability as domestic. A foreign corporation, by establishing an agency in another State other than that of its domicile, thereby so far becomes an inhabitant of such State as to become subject to the process of its courts.[3]

If an agent or officer of a corporation is doing business for it in a State he may be served with process binding on his principal; but if he is there, not in the interest of the corporation, it cannot be served by service upon him.[4]

The corporation must obtain the consent of the State before it can send an agent into its territory to do business.[5]

Generally one who is temporarily in a State in which he does not have a domicile, cannot be subject to garnishment.[6]

By strict construction of statutes which seem to be different than that of Illinois, it is held that, when the only thing reached by the process is a debt due from the garnishee to the principal defendant, such debt is regarded as local, having a *situs* where the garnishee resides.[7]

It is also held that, when a corporation has a regular place of business in another State other than that of its domicile, it is subject to garnishment in that State, if it has an officer or agent upon which process may legally be served,[8] and also if it has property of the defendant there. This is different from the Illinois case,[9] in this: It was not held necessary in the Illinois case that the garnishee must have property of the principal defendant in order to sustain the cause; a debt due by the garnishee to the principal defendant, was sufficient to maintain the action. The general rule seems to be that, where a foreign corporation operates in a State, either by comity or by conformity to statute,[10] it may be garnished,[11] or a non-resident may be served with process when found within the State, and the proceedings hold good if he has property of the principal defendant within the State, or owes him a debt payable within the State.[12] But where the garnishee is indebted to the principal defendant, it will not vary his liability that his contract with the latter is to pay the money in another State.[13]

Exemption laws of some of the States protect the wages, to a certain amount, of employees of interstate corporations. So it has become a practice in some States to garnishee the interstate corporations, such as railroad, telegraph, express and telephone companies in the State where the employee's wages are not protected by exemption laws. A foreign corporation doing business in another State may be garnished for a debt due to a non-resident employee, the debt being contracted outside of the State where the garnishee proceedings are had; so in some cases a laborer is obliged to surrender his wages to pay debts in a State not of his domicile.[14]

Thus, a garnishment proceeding, in Iowa, will be conducted according to the laws of that State, and the laws of the State where the debt was incurred will not be recognized, and the employee cannot protect himself by the laws of his domicile.[15]

It appears that interstate comity does not

[2] Railroad Co. v. Barron, 83 Ill. 365; Roche v. Ins. Assn., 2 Bradw. (Ill. App.) 360; Moore v. R. Co., 43 Iowa, 385; McAllister v. Ins. Co., 28 Mo. 214.

[3] Branson v. Ins. Co., 21 Wis. 516; Fethian v. Railroad Co., 31 Pa. St. 114; McAllister v. Ins. Co., 28 Mo. 214.

[4] St. Claire v. Cox, 106 U. S. 350.

[5] Paul v. Virginia, 8 Wall. 168; Ins. Co. v. French, 18 How. (U. S.) 404.

[6] Rindge v. Green, 52 Vt. 204.

[7] Smith v. Railroad Co., 33 N. H. 342; Green v. Bank, 25 Conn. 452; Taft v. Mills, 5 R. I. 393; Tingley v. Bateman, 10 Mass. 346.

[8] Bank v. Huntingdon, 129 Mass. 444.

[9] Railroad Co. v. Crane, 102 Ill. 249.

[10] Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566; State v. Railroad Co., 25 Vt. 433.

[11] Railroad Co. v. People, 31 Ohio St. 537.

[12] Young v. Ross, 11 Foster, 201; Hart v. Anthony, 15 Pick. 445; Nye v. Liscombe, 21 Pick. 263; Lawrence v. Smith. 45 N. H. 533; Lovejoy v. Albree, 33 Me. 414; Green v. Bank, 25 Conn. 452; Willet v. Ins. Co., 10 Abb. Pr. 193.

[13] Express Co. v. Scott, 104 Mass. 164; Sturtevant v. Robinson, 18 Pick. 175; Drake on Attach. (4th ed.) § 597; Railroad Co. v. Crane, 102 Ill. 249.

[14] Railroad Co. v. Thompson, 31 Kan. 180; Railroad Co. v. Crane, 102 Ill. 249.

[15] Broadstreet v. Clark, 65 Iowa, 679; Mooney v. Railroad Co., 60 Iowa, 346.

preclude one State from awarding a judgment on a garnishment proceeding, notwithstanding the fact that the wages garnished are exempt in the State where the labor was done and debt incurred.[16]

In the United States district court for the southern district of New York, on a seaman's libel of a boat for wages, the owner had been garnished in Massachusetts State court and compelled to pay the judgment rendered against him. *Held*, in absence of any decision of the United States Supreme Court settling this question of interstate garnishment, the judgment in the Massachusetts State court should be recognized.[17]

A creditor in Maryland endeavored to collect a claim made in that State in the courts of West Virginia, in order to evade the exemption laws of the former State. The proceedings were by garnishment. The debtor applied to the inferior court for an injunction to restrain the collection of this debt. The court refused the application. The debtor appealed and the Supreme Court of Maryland reversed the decision and granted the relief prayed.[18]

Some of the States have enacted statutes making it an offense to go into another jurisdiction to evade the laws of the State where the debt is contracted, in order to garnishee the wages of laborers employed by these interstate corporations. Thus, Indiana has enacted:[19] "Whoever, either directly or indirectly, assigns or transfers any claim for debt against a citizen of Indiana, for the purpose of having the same collected by proceedings in attachment, garnishment, or other process, out of the wages or personal earnings of the debtor, in courts outside of the State of Indiana, when the creditor, debtor, person, or corporation owing the money intended to be reached by the proceedings in attachment on each and all within jurisdiction of the courts of the State of Indiana, shall, upon conviction thereof, be fined in any sum not more than fifty dollars, nor less than twenty dollars, for each offense."

When both creditor and debtor are residents of the same State and within the jurisdiction of the same court, its general power of courts of equity to enjoin creditors from bringing suits in a foreign court is sufficient to withhold this kind of litigation, though the American courts are not uniform on this point.[20]

"The attempt to take from a workman the wages earned by him by sending the claim to a foreign jurisdiction where our exemption laws will not avail him, is one that the courts will not tolerate. They will, on the other hand, lay the strong arm of chancery upon persons within their jurisdiction, and prevent them from taking away the wages which our constitution and our statute wisely secure to him for the support of his family."[21]

If the garnishee proceedings are finally decided in the foreign State, the courts of some of the States from which the debt was taken for collection will not then interfere.[22]

An injunction will be granted upon the ground that it is against equity for a creditor to evade the laws of his own country.[23]

The old custom of London that the garnishee must reside in the territorial jurisdiction of the court to render process affective to reach the fund, is not recognized by the American courts, because it was a local custom.[24]

Proceeding by foreign attachment was unknown to the common law. In passing attachment laws, there is no ground to suppose that the legislature had in view the local customs of London, or could have intended them to have any bearings in the construction of attachment laws.[25] But if the wages are garnished in a foreign jurisdiction and applied on the debt, it will not prevent a recovery, it would seem, in the court of the domicile and of the contract.[26]

If a claim is thus transferred, contrary to statute to a neighboring State and collected by a garnishee process, no action for damages will lie therefor against the original creditor, even though the principal debtor is

[16] Stevens v. Brown, 20 W. Va. 450.
[17] The City of New Bedford, 20 Fed. Rep. 57.
[18] Keyser v. Rice, 47 Md. 203.
[19] Rev. Stat. 1881, § 2163.
[20] Wilson v. Josephs, 107 Ind. 490; Zimmerman v. Franke, 34 Kan. 650; Railroad Co. v. Maltby, 34 Kan. 125; Snook v. Snetzer, 25 Ohio St. 516; Engel v. Schenerman, 40 Ga. 206; Bank v. Railroad Co. 28 Vt. 470; Vail v. Knapp, 49 Barb. 299; Dehon v. Foster, 4 Allen, 544; Pearce v. Olney, 20 Conn. 543.
[21] Wilson v. Josephs, 107 Ind. 490.
[22] Railroad Co. v. May, 25 Ohio St. 347; Morgan v. Neville, 74 Pa. St. 53.
[23] Mackintosh v. Ogilvie, 4 Term Rep. 193.
[24] 1 Rall's Ab. 552; 1 Com. Dig. 580.
[25] Railroad Co. v. Crane, 102 Ill. 249.
[26] Gilbert v. Black, 1 Legal Chron. 133.

annoyed and put to additional expense by such transfer.[27] But it seems that a foreign statute will be enforced, provided there is a similar statute in the State where the suit is brought, founded upon the same general ground.[28]

In Iowa, exemptions from garnishment by the laws of another State, can be offered as a defense, provided the amount due by the garnishee is exempt by the laws of Iowa.[29] This same practice is accepted by West Virginia, and the exemptions laws of another State will be recognized as a defense, if West Virginia has similar laws.[30]

Where the creditor and debtor are residents of the same State, the debtor has a remedy by injunction to prevent the creditor going into another State to avoid the exemption laws of his own domicile, and thereby garnishee the wages of the debtor.[31]

The leading case in this country is Dehon v. Foster,[32] which holds that the authority of the court upon a proper case is sufficient to restrain any person within its jurisdiction from prosecuting a case, either in the courts of the State or in the courts of foreign States or countries; that courts of equity have vested authority over persons within their jurisdiction to restrain them from doing acts which will prove injurious to others. The decree of the court in such cases has reference solely to the party commanded, and does not concern the tribunal when the suit or proceedings are pending, and is wholly immaterial that the party is prosecuting his action in the courts of a foreign State or country. If the case is such as to render it the duty of the court to restrain a party from suing another in the courts of this State, or at their domicile, the court is bound in like manner to enjoin him from prosecuting a suit in a foreign court.

In another case,[33] it was held as a general rule, the propriety of which is apparent, the courts of a State decline to restrain its citizens from proceeding in an action which has been begun in the court of another State, yet there are exceptions to this rule, and when a proper case is presented, fairly presenting such exception, extreme delicacy should not deter the court from commanding parties within its jurisdiction to prevent oppression or fraud. Comity between States does not forbid such action on the part of the court. In granting the injunction the court deals with citizens of its own State, and does not interfere with the action of the courts in a foreign State.

This same doctrine has been adhered to in Great Falls v. Worster,[34] where it is held that there would be a great defect in the administration of law if the mere fact that the property was out of the State could deprive the court of the power to act. Injustice can be perpetrated by citizens against citizens of a State by going beyond the State's jurisdiction and committing wrong, as by staying in the State and doing it. The courts should issue injunctions whenever it is necessary to prevent injustice in a proper case, and when it can be done consistently with the acknowledged practice in courts of equity, and this court has jurisdiction to restrain a creditor from suing a debtor in a foreign State to evade the laws of his own State.

The jurisdiction of equity is recognized to restrain citizens of one State from beginning suits in a foreign State, though generally denied as to suits already instituted.[35] But some courts object to issuing injunctions to prevent citizens from seeking relief in a foreign jurisdiction, in order to evade the laws of their domicile. Because, that if courts of one State see fit to enjoin proceedings in another, the other might retaliate in like manner by enjoining proceedings in the first and thus give rise to an endless conflict of jurisdiction.[36]

The New York courts have refused to grant this relief in some cases, yet the injunction has been allowed to issue in some instances as is shown by decisions.[37]

The English doctrine is consonant with the

[27] Uppinghouse v. Mundel, 103 Ind. 238.

[28] Morris v. Railroad Co., 65 Iowa, 727; Knight v. Railroad Co., 108 Pa. St. 250; Leonard v. Navigation Co., 84 N. Y. 48; Boyce v. Railroad Co., 63 Iowa, 70; Stockman v. Railroad Co., 15 Mo. App. 503.

[29] Leiber v. Railroad Co., 49 Iowa, 688.

[30] Stevens v. Brown, 20 W. Va. 451.

[31] Keyser v. Rice, 47 Md. 203; Snook v. Snetzer, 25 Ohio St. 516; Wilson v. Josephs, 107 Ind. 490.

[32] 4 Allen, 545.

[33] Vail v. Knapp, 49 Barb. 299.

[34] 23 N. H. 470.

[35] Mead v. Merritt, 9 Paige, 402.

[36] Carroll v. Bank, 1 Harring. (Mich.) 197; Burgess v. Smith, 2 Barb. 276; Williams v. Ayrault, 31 Barb. 364.

[37] Hays v. Ward, 4 Johns. 123; Vail v. Knapp, 49 Barb. 299.

weight of authority of the American courts. The English court of chancery, in proper cases, acts *in personam* upon parties within its jurisdiction, and prohibits them from proceeding further with suit in foreign States. The proceedings are regarded as purely *in personam*, the mandate of the court being directed to the parties and not to the tribunal in which the suit is pending.[38]

But where the courts of the debitor's domicile have no jurisdiction over the creditor, as in the Illinois case,[39] there is no remedy to the debtor to save his wages from being applied to his indebtedness, except when the law of the debtor's domicile is founded on the same general grounds as that of the State where the action is brought, in which case the court will take cognizance of that law.[40]

Summary.—1. Foreign corporations must assume the same burden and liability as domestic.

2. Service on the accredited agent or officer of a foreign corporation binds it.

3. A foreign corporation can be garnished for the wages of a non-resident employee; and such action is not local.

4. Though by custom of London and laws of some of the States an action of garnishment for debt merely is regarded as local, having a *situs* at the domicile of the debtor.

5. Generally a foreign corporation operating in a State, either by comity or by statute, may be garnished, and the action sustained if it has property of the defendant or owes the defendant a debt, payable within the State; though it has been held that it will not vary the garnishee's liability that his contract is to pay the money in another State.

6. When both debtor and creditor are residents of the same State, the courts of the State will enjoin the creditor from going into other States to evade the laws at his domicile in collecting the debt.

7. If wages are garnished in a foreign jurisdiction and applied on the debt, it will not prevent a recovery, it would seem, in the court of the debtor's domicile, though the decisions are not uniform on this point.

8. If a claim, contrary to statute, is taken to a foreign jurisdiction and collected, the debtor has no remedy for his damages thus incurred.

9. Generally a foreign statute will be enforced, provided there is a similar statute founded upon the same general grounds, where the suit is brought; otherwise not.

D. H. PINGREY.

[38] Portarlington v. Soulby, 3 Myl. & K. 104; Cranstown v. Johnston. 3 Ves. 182; Carran v. Maclaren, 5 H. L. Cas. 416; Beckford v. Kemble, 1 Sim. & S. 7; Harrison v. Gurney, 2 Jac. & W. 563.

[39] Railroad Co. v. Crane, 102 Ill. 249.

[40] Stevens v. Brown, 20 W. Va. 451; Leiber v. Railroad Co., 49 Iowa, 688.

STATUTE OF FRAUDS — PROMISE TO PAY ANOTHER'S DEBT.

STEWART V. JEROME.

Supreme Court of Michigan, July 11, 1888.

Where a debtor of both plaintiff and defendant absconds, leaving property in possession of the defendant, an oral promise by the latter to pay plaintiff's claim, if plaintiff would not attach the property as he was intending to do, is within the statute of frauds.

CHAMPLIN, J., delivered the opinion of the court:

The suit in this case was commenced by declaration which consisted of the common counts in *assumpsit*. The defendant demanded a bill of particulars, and one was served, which consisted of several items from May 2 to June 5, 1884, of oats, amounting to $395.66, and a statement that the goods were sold and delivered to Joseph H. Morris for feed for his livery horses at his stables on Michigan Grand avenue, Detroit; that said Morris owed defendant $10,000, and to secure the same defendant held a chattel mortgage on Morris' horses, harnesses, and other property in said stables, dated June 4, 1884; that said mortgage included no goods or stock of Morris acquired by him after the date thereof, and that Morris purchased and had in his stables stock, goods, and property not covered by said mortgage to the amount of $4,000; and on or about June 20, 1884, said Morris absconded with intent to defraud his creditors; that said Jerome took possession of all of said horses, coupes, carriages, harnesses, and other property, including stock and property not included in his mortgage, and more than sufficient to satisfy plaintiff's said demand, which, with the mortgaged property, was liable to attachment; that of the above written account, all being past due and unpaid, $200 of the oats were at the time Morris absconded then in the stables, and not fed out, and were purchased fraudulently, and were repleviable by plaintiffs, on the ground that they were obtained by fraud, by said Morris, and said plaintiffs intended to proceed to replevin said $200 worth of oats, and intended to proceed by attachment against the residue of the property taken by defendant to satisfy his mortgage, and not covered

by it; and the defendant well knowing all the above premises, and in order to prevent said plaintiffs from enforcing payment of their just debt and lien by attachment and replevin, did promise and agree with said plaintiffs that if they would forbear to enforce their said claims he, said defendant, would assume and pay said debt of said plaintiffs, and, relying on said promises of defendant, did so forbear; and took no steps to replevin or attach or attempt collection of their debt, and have hitherto forborne until the commencement of this suit, relying on his, defendant's, promise to pay said debt. The defendant pleaded the general issue. Upon the trial of the cause the plaintiffs, against objections made by counsel for defendant that the proof offered was inadmissible under the pleadings, introduced evidence tending to prove the indebtedness of Morris to plaintiffs, the execution of the chattel mortgage by Morris to defendant, the departure of Morris, and the possession taken by defendant of the whole stock and property in the stable, and the promise of the defendant. The plaintiffs are copartners, composed of Daniel Stewart, the father, and his son, Andrew T. As soon as Daniel Stewart had learned that Morris had left the city, he went to the stables on Michigan Grand avenue, and found defendant's servants in possession, and one of them informed him that defendant wished to see him immediately, and took him in a buggy to the office of defendant, where he had a conversation with defendant as follows: "State what that conversation was fully. Answer. He asked me how much Mr. Morris owed me, and I told him he owed me $395.66, at the same time handing him the bill. He look at it a moment, and turned around to me and asked me what I was going to do, and I told him I was going to replevin my oats and attach other property to get my money; that I could not afford to lose it. Q. Now, at that time, what was the fact of your intending to attach any particular property in the stable that he had recently been purchasing? A. Mr. Morris offered me, a few days before he left, a span of large bay mares, and offered me them cheap, tried to persuade me very much to buy them, and also a two-seated wagon that Morris told me was not included and Jerome had no business with. Q. Then you intend to attach what? These horses and the wagon, you say, and the open account? A. Yes, sir. Q. Now, Mr. Jerome asked you what you were going to do, and you told him you were going to replevin your oats, and attach some other property, and get your debt. What did he say to you? A. Be quiet, do nothing, and I will pay you; that is it exactly. Q. What else did he say? A. That my bill was similar to a supply man on a railroad—when the railroad broke down the supply man had to be paid whoever was paid, and he would pay me. Q. What did you say to that? A. Well, I agreed to it." He further testified that he did not replevin or attach because he relied upon Mr. Jerome paying him, and was satisfied he would. That he reported to his son the interview with Mr. Jerome, and he was not satisfied with it; and they both went the second day after to see Mr. Jerome, when nearly the same conversation was had as before, Mr. Jerome agreeing to pay them if they "stood quiet," and would wait six months, to which plaintiffs agreed, at the end of which time they called upon him, when he offered $200 in cash to settle the bill, or, if they would wait ten months, he would pay the whole face of it. The plaintiffs then agreed to wait ten months, and directed an entry to be made on their books so they would know when the ten months was up. At the end of this time plaintiffs again called upon defendant for payment, and he was not yet ready; "complained that he had sold his business to Edmunds, but got very little or no money, and he was scarce of money." Later they called again, and the plaintiff Daniel Stewart testified to the conversation that then occurred as follows: "My son went to him and asked him what was the reason he would not pay us. Why didn't you let us replevin, and attach at once, and get our money? Jerome got a little wrathy, and he said that unless he was willing to pay the bill we could not get it any more than we could get the paint off the wall." The defendant introduced no testimony, and the plaintiffs recovered.

The defense to the action is placed upon two grounds: First. That the promise of defendant is void under the statute which enacts that every special promise to answer for the debt, default, or misdoings of another person shall be void unless some note or memorandum thereof be in writing, and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized. Second. If not void, no recovery can be had upon such promise under the common counts in *assumpsit*. This clause of the statute of frauds has often come before this court for consideration. In Corkins v. Collins, 16 Mich. 478, the plaintiff sued Collins on a verbal promise to pay a board bill and money lent, due from one James Sykes. The consideration was the release or certain trunks supposed to be held for the debt. The defense was the statute of frauds. Mr. Justice Campbell said: "Such a release of a valid claim would be a sufficient consideration for a written promise, for, if a consideration passes from the promisee, it usually makes no difference to whom it passes. * * * It is not pretended that an extension of time, or any other agreement involving no release of property or extinguishment of liability, if made in favor of the principal debtor, would authorize the verbal promise of a third person to pay the debt to be enforced. But a distinction is sought to be drawn where property is released or given up to the debtor. There is no obvious reason for any such distinction. The law puts all valuable considerations on the same footing. * * * When by the release of property from a lien the party promising to pay the debt is enabled to apply it to his own benefit, so that the release inures to his own advantage, it is

quite easy to see that a promise to pay the debt in order to obtain the release may be properly regarded as made on his own behalf, and not on the behalf of the original debtor; and any possible advantage to the latter is merely incidental, and is not the thing bargained for. That promise is therefore in no proper sense a promise to answer for anything but the promisor's own responsibility, and need not be in writing." In Calkins v. Chandler, 36 Mich. 320, it was held that an agreement to extend the time of payment and forbear to sue a third person, who was plaintiff's debtor, was a sufficient consideration for defendant's promise to pay. And this was because the promise of defendants to pay the debt of such third person was at the same time, when paid, to apply on an indebtedness that was to accrue against themselves, and was consequently a promise to answer for their own debt. And Mr. Justice Cooley in that case quotes with approval from the opinion of Mr. Justice Shaw in Nelson v. Boynton, 3 Metc. 396, as follows: "The rule to be derived from the decisions seems to be this: That cases are not considered as coming within the statute when the party promising has for his object a benefit which he did not before enjoy accruing immediately to himself. But where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute." In Curtis v. Brown, 5 Cush. 488, Shaw, C. J., said: "It is not sufficient ground to prevent the operation of the statute of frauds that the plaintiff has relinquished an advantage, or given up a lien, in consequence of the defendant's promise, if that advantage had not also directly inured to the benefit of the defendant, so as in effect to make it a purchase by the defendant of the plaintiff. The cases in which it has been held otherwise are those where the plaintiff, in consideration of the promise, has relinquished some lien, benefit, or advantage for securing or recovering his debt, and where by means of such relinquishment the same interest or advantage has inured to the benefit of the defendant. In such cases, although the result is that the payment of the debt of the third person is effected, it is so incidentally and indirectly, and the substance of the contract is the purchase by the defendant of the plaintiff of the lien, right, or benefit in question." The doctrine was declared and acted upon in several other cases in that State. Fish v. Thomas, 5 Gray, 45; Jepherson v. Hunt, 2 Allen, 417; Furbish v. Goodnow, 98 Mass. 296; Ames v. Foster, 106 Mass. 400; Wills v. Brown, 118 Mass. 137; Fears v. Story, 131 Mass. 47. The same doctrine is recognized in Wisconsin (Clapp v. Webb, 52 Wis. 638, 9 N. W. Rep. 796); and in Indiana (Crawford v. King, 54 Ind. 10; Palmer v. Blain, 55 Ind. 11); and in Vermont (Whitman v. Bryant, 49 Vt. 512). In New York the exposition of this section has been somewhat variant, as will be seen by reference to Leonard v. Vredenburgh, 8 Johns. 29; Mallory v. Gillett, 21 N. Y. 412; Brown v. Weber, 38 N. Y. 187; Ackley v. Parmenter, 98 N. Y. 425. The latest enunciation of the principles which should be applied in cases coming under this provision of the statute in that State is by Mr. Justice Finch, in Rintoul v. White, 15 N. E. Rep. 318 (decided January 17, 1888). He reviews the leading decisions in New York above cited, and says they "have ended in establishing the doctrine in the courts of this State, which may be stated with approximate accuracy thus: That where the primary debt subsists, and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor, and beneficial to him, and such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor." The difficulty in applying the doctrine, and one which has given rise to much seeming conflict in the authorities, lies in the failure to distinguish between the consideration for the promise of a third person to pay the debt of another, and the promise itself, whether it be to answer for the debt of another, or to pay or perform his own obligation. There must be a consideration to support every promise, whether it be evidenced by writing or not; and where the promise is to answer for the debt, default, or misdoing of another, the statute requires that such promise must be evidenced by writing. Under the undisputed testimony there can be no doubt but that in consideration of Mr. Jerome's promise the plaintiffs relinquished an advantage which they had for securing their own debt. The oats and the horses and buggy not covered by Jerome's chattel mortgage were liable to be attached at the suit of the plaintiffs. This is a sufficient consideration for the promise; but the difficulty is that this advantage which the plaintiffs forbore to exercise or appropriate did not inure to the benefit of the defendant. The plaintiffs had no lien which they released. They had no title to any of the property which they transferred to defendant. It was alleged in the notice attached to the bill of particulars that the plaintiffs owned the oats which they had delivered to defendants because they were obtained by fraud, but there is no evidence which supports such claim. It is true that, by forbearing to attach such oats and other property, it was left in the hands of Jerome, and it may be inferred that he converted such property to his own use, but he derived no right or title thereto from plaintiffs, and is still liable to account to or pay for such property to Mr. Morris, or the true owner, whoever he may be. There was nothing, therefore, which inured to the benefit of defendant, received from the plaintiffs, which supports a new promise or agreement to assume and pay the amount as an original debt from defendant to plaintiffs. There is nothing in the facts or circumstances of this case to distinguish it from that of Waldo v. Simonson, 18 Mich. 345, and we think this case is ruled by that. Had the title to the oats in the bin remained in the plaintiffs, and the defendant under his promise

had appropriated and fed the oats to his animals, the case would have been different; or had the plaintiffs attached first, and then, in consideration of the promise, released, so that the rights of possession acquired by the attachment passed to defendant, it would have afforded a consideration for the promise to pay the debt as his own within the authorities. The objection to the pleadings stands or falls with the ruling upon the question as to the promise being void under the statute of frauds. If the promise had been held good as an original promise to pay defendant's own debt, the common counts would have been sufficient, and a recovery could have been maintained under the count stated. The judgment must be reversed, and a new trial granted.

NOTE.—Few legislative enactments have given rise to more litigation than the statute of frauds; and, perhaps, no section of that statute has been more prolific of litigation than the one applied in the principal case, regarding special promises "to answer for the debt, default, or miscarriages of another person." As said by Chief Justice Shaw: "The cases on this branch of the statute of frauds are so numerous that it would be a difficult task to review them; and the distinctions as to cases which are or are not within the statute are so nice, and often so shadowy, that it would be still more difficult to reconcile them."[1] A striking example of the uncertainty of the law and the vacillation of the courts upon this question is given in the note to Rintoul v. White,[2] where it is shown that the English courts changed their views upon the question of the effect of a parol promise by one to indemnify another for becoming surety for a third person, four times in less than seventy years, before, in 1862, they finally concluded that such a promise was not within the statute.[3] The courts of New York have been almost equally unsettled in their exposition and application of this section.[4] And courts that have come to the same conclusion often give different reasons for their decisions, thus rendering it very difficult to deduce from them any general rules upon the subject.

There is one general rule, however, upon which there is substantial agreement among the authorities. It is this: "In order to bring the promise within the prohibition of the statute, it must be 'collateral' to a liability on the part of a principal. In other words, there must, at the time the promise is made, be an actual primary liability of a principal to the promisee which continues after the making of the promise, or there must be contemplated, as the basis of such promise, the future primary liability of a principal."[5] This rule applies to a promise to answer for a party who cannot legally be made liable, as, for a minor or the like,[6] for in such case there is no principal or primary liability to which the promise can be collateral. And this is also true, where the original debtor is discharged leaving the secondary liability as the sole debt.[7]

The consideration has often been made to cut an important figure in many of the cases decided under this section of the statute of frauds. Thus, where the promise inures directly to the benefit of the promisor and is founded upon a consideration moving to him, or where such is its main object, it has been held not within the prohibition of the statute.[8] But mere inconvenience to the promisee or the relinquishment of an advantage by him without benefit to the promisor, has been held insufficient to take the promise out of the statute.[9] So, it has been held that a mere incidental benefit resulting to the promisor is insufficient.[10] So far has this doctrine of the importance of the consideration been carried, that Chancellor Kent, then chief justice, laid it down as an absolute rule of law that the promise is not within the statute wherever it arises "out of some new and original consideration of benefit or harm moving between the newly contracting parties."[11] But while the consideration often exerts an important influence, it is not always of itself controlling. Mr. Brandt suggests, with good reason, that "the true question is, 'what is the promise?' not 'what is the consideration?'"[12] As said by an eminent judge: "A new consideration for a new promise is indispensable without the statute, and if a new consideration is all that is needed to give validity to a promise to pay the debt of another, the statute amounts to nothing."[13]

Among the parol promises that have been held to be within the prohibition of the statute are the following: A promise by the mortgagee of a part of a vessel to those who had furnished supplies, for which they had no lien, to pay the debt if they would not attach the interest of the other owners.[14] A promise to pay for goods to be sold to another, where the goods were afterwards sold and charged to both;[15] a promise by the president of a bank to a depositor that if the latter would not withdraw his deposit, he would pay the depositor the full amount of his deposit if the bank should fail;[16] a verbal agreement by an assignee of a lease to pay a mortgage on the leased premises;[17] and

[1] Chapin v. Lapham, 20 Pick. 467.

[2] 26 Cent. L. J. 368, 371.

[3] Reader v. Kingham, 13 C. B. 344. See also Thomas v. Cook, 8 Barn. & Cress. 728; Howes v. Martin, 1 Esp. 162.

[4] See the cases of Leonard v. Vredenburgh, 8 Johns. 29; Mallory v. Gillett, 21 N. Y. 412, and Brown v. Weber, 38 N. Y. 187, reviewed by Finch, J., in Rintoul v. White, 15 N. E. Rep. 318; s. c., (with note) 26 Cent. L. J. 368.

[5] Brandt on Suretyship and Guar., 52, § 41. See, to this effect, Anderson v. Davis, 9 Vt. 136; s. c., 31 Am. Dec. 612; Watson v. Jacobs, 29 Vt. 171; Nelson v. Boynton, 3 Metc. 396; s. c., 37 Am. Dec. 148, opin. 149; Furbish v. Goodnow, 98 Mass. 297; Wallace v. Wortham, 25 Miss. 119; s. c., 57 Am. Dec. 197; Wood on Frauds, 156, § 94.

[6] Chapin v. Lapham, 20 Pick. 467; Downey v. Hinchman, 25 Ind. 453; Measer v. Wagner, 1 McCord (S. C.), 395; Browne on Stat. of Frauds, 153, § 156.

[7] Anderson v. Davis, 31 Am. Dec. 612; Watson v. Jacobs, 29 Vt. 171; Langford v. Freeman, 60 Ind. 47; Mulcrone v. Am. L. Co., 55 Mich. 622; Holm v. Sandberg, 32 Minn. 427; Wood on Frauds, 214, § 129.

[8] Crawford v. Edison (Ohio), 13 N. E. Rep. 80; R. R. Co. v. Houston (Tenn.), 2 S. W. Rep. 36; Emerson v. Slater, 22 How. (U. S.) 28.

[9] Nelson v. Boynton, 3 Metc. 396; s. c., 37 Am. Dec. 148; Brightman v. Hicks, 108 Mass. 247; Browne on Stat. Frauds, §§ 203, 204, and authorities cited in principal case.

[10] Clapp v. Webb, 13 Cent. L. J. 314; Curtis v. Brown, 5 Cush. 488.

[11] Leonard v. Vredenburgh, 8 Johns. 29.

[12] Brandt on Suretyship and Guar., 70, § 55.

[13] Strong, J., in Maule v. Bucknell, 50 Pa. St. 39. See also to the effect that a new consideration is not necessarily conclusive. Lampson v. Hobart, 28 Vt. 700; Fullam v. Adams, 37 Vt. 391; Noyes v. Humphreys, 11 Gratt. 636.

[14] Ames v. Foster, 106 Mass. 400; s. c., 8 Am. Rep. 343.

[15] Matthews v. Milton, 26 Am. Dec. 247.

[16] Waether v. Merrell, 6 Mo. App. 370. See also Morse v. Mass. Nat. Bank, 1 Holmes (U. S. C. C.), 209.

[17] Goelet v. Farley, 57 How. Pr. (N. Y.) 174.

a verbal promise to pay a mortgage debt made by the purchaser of the equity of redemption in land after the purchase, and not connected with the consideration to be paid therefor.[18]

Among the promises held to be without the statute, and therefore valid, are the following: A promise to indemnify another if he would enter into a recognizance for the release of a prisoner;[19] a promise by A to pay a debt due B after its assignment to C;[20] a promise to pay the debt of another out of the proceeds of the latter's property placed in the hands of the promisor for that purpose;[21] and a promise by a surety on a note to indemnify others if they would also sign as sureties.[22] Where the creditor has a lien on the property of the principal debtor, which he relinquishes in consideration of the promise, and the lien thereby inures to the benefit of the promisor, it would seem that the promise is not within the statute;[23] but where the lien does not inure to the benefit of the promisor, the rule seems to be otherwise.[24] If the transaction amounts to a purchase of the debt or lien by the promisor, the promise is clearly not within the statute.[25] E.

[18] Berkshire v. Young, 45 Ind. 461. But generally a promise by a grantee of lands to pay the grantor's mortgage debts is not within the statute. Wood on Fraud, § 142 and authorities cited.

[19] Anderson v. Spence, 12 Cent. L. J. 562; s. c., 72 Ind. 315; s. c., 37 Am. Rep. 162. Many authorities are reviewed in the opinion in this case by Elliott, J., supporting the principle therein applied. See also Wood on Frauds, 288, 290, § 159, where the doctrine of this case is expressly approved. But compare the authorities cited *pro* and *con* on the question of the effect of the statute upon promises to indemnify, cited in note to Rintoul v. White, 26 Cent. L. J. 368, 371.

[20] Trow v. Braley, 19 Cent. L. J. 293.

[21] Meyer v. Hartman, 72 Ill. 442; Nelson v. Hardy, 7 Ind. 364; Williams v. Leper, 3 Burr. 1886; Brandt on Suretyship and Guar. 60, § 49 and authorities cited. But the mere fact that the promisor has in his possession property of the debtor not left with him for the purpose of paying the debt, will not, of itself, be sufficient to take the promise out of the statute. Hughes v. Lawson, 31 Ark. 613; Delts v. Parker, 1 South. (N. J.) 219.

[22] Horn v. Bray, 51 Ind. 555; Farrell v. Maxwell, 28 Ohio St. 383; Barry v. Ransom, 12 N. Y. 462. *Contra:* Bessig v. Britton, 59 Mo. 204; s. c., 2 Cent. L. J. 296.

[23] Brandt on Suretyship and Guar. 62, §§ 49, 50; Teague v. Fowler, 56 Ind. 569; Luask v. Malone, 34 Ind. 444; Coquard v. Union Depot Co., 10 Mo. App. 261; Blackford v. Plainfield Gas Co., 43 N. J. L. 438.

[24] Browne on Stat. of Frauds, 195-204; Curtis v. Brown, 5 Cush. 488; Cross v. Richardson, 30 Vt. 461; Spooner v. Dunn, 7 Ind. 81; Arnold v. Stedman, 45 Pa. St. 186; Cowenhaven v. Howell, 36 N. J. L. 323; Nelson v. Boynton, 3 Metc. (Mass.) 396; Wood on Frauds, § 150. But compare Houldich v. Milne, 3 Esp. 86; Dunlap v. Thorne, 1 Rich. (S. C.) 213; Slingerland v. Morse, 7 Johns. 463; Stewart v. Hinkle, 1 Bond (U. S. C. C.), 506. New York, however, seems to have fallen into line with the majority. See Rintoul v. White, 26 Cent. L. J. 368.

[25] Castling v. Aubert, 2 East, 325; Austey v. Marden, 1 Bos. & Pul. N. R. 124.

WATER AND WATER-COURSES—OBSTRUCTION—SURFACE-WATER — MEASURE OF DAMAGE—VERDICT—AVERAGE.

SULLENS V. CHICAGO, ETC. R. CO.

Supreme Court of Iowa, June 9, 1888.

1. *Water and Water-courses — Obstruction — Surface water.*—Water which in flood time escapes from a river and overflows adjacent lands is not surface water, and a railroad company which by its embankments obstruct a flow of such water is liable in damages therefor.

2. *Limitation—Running of the Statute.*—An action for the obstruction of a stream or water causing an overflow accrues when the overflow actually takes place, and not when the obstruction is made.

3. *Damages—Measure of Damages.*—The measure of damages, in an action for overflowing land by obstructing a water-course, is the difference in the value of the land before and after it is affected by such overflow.

4. *Practice—Verdict—Average.*—A verdict obtained by averaging the amounts proposed by each juror is not illegal if there has been no agreement beforehand to abide by the result of the average.

ROBINSON, J., delivered the opinion of the court:

The defendant owns and operates a railway which crosses a stream of water in Jasper county, known as "Rock creek." At the point of crossing, the stream is from twenty-five to thirty feet in width, and is bordered on the east by a strip of land lower than the level of the railway track, and on the west by low ground, which extends back from the creek a distance of from a quarter to half a mile. The land and stream form a valley bounded on the west by highlands. Prior to 1875, defendant's railway crossed the creek and lowlands by means of a wooden bridge and trestle work. During that year a stone culvert was constructed over the stream, and embankments of earth were commenced and completed a year or two latter, which extended across the lowlands and culvert to a height of about forty feet above the general level of the lowlands. The culvert was about eighty feet in length, thirty in width, and twenty-two in height, and constituted the only opening in the embankment for the passage of the waters from above it. The plaintiffs owns the land, which is bounded on the south by the right of way of defendant on which the embankment in question is built. Rock creek flows, for a considerable distance, through the lands of plaintiff before it reaches the culvert in question. In June, 1882, a portion of the culvert fell in consequence of high water. It was never rebuilt; but, to carry its railway across the stream, defendant removed a portion of the earth from the culvert, and constructed over it a wooden bridge. It is contended by plaintiff that, when the culvert was constructed, the bed of the stream under it was raised several feet by means of stone-work; that a portion of it fell in consequence of the fault

of plaintiff, precipitating into the stream below, in such manner as to further obstruct the flow of water, large quantities of stone and earth; that defendant had wrongfully permitted said obstacles to remain in the stream; that the embankment caused all the water which fell upon the land adjacent to said stream to flow through said culvert; that its capacity, when constructed, was not sufficient to discharge such water; and that its original capacity has been diminished, and the flow of water hindered, by the obstacles aforesaid; that, in consequence of these faults, the lands of plaintiff were overflowed at different time during four years, commencing with 1882, and great damage caused thereby. It is insisted by defendant that, in constructing the embankment and culvert in question, it was only required to make provision for the flowing across its right or way of so much water as could be contained within the banks of the stream, and that it is not responsible for damages which were caused by water which overflowed such banks.

1. The question involved is one upon which there is much conflict of authorities. Many of them seem to sustain the position of appellant. The case of Abbott v. Railroad Co., 83 Mo. 271, is in many respects similar to this case, and is relied upon by appellant. That case adheres to the common law rule, and seems to depend in part upon the fact that by the statutes of Missouri the common law is made the rule of action and decision in that State. In this State there is no requirement of that kind, and we are free to determine the questions involved according to such rules of law as shall seem to us to be applicable. The difficulty which must sometimes arise from attempts to apply the strict rule of the common law to all cases is illustrated by the fact that the Supreme Court of Missouri was constrained to abandon it in two cases, which were overruled in the one above cited. Each case must of necessity depend largely upon its own facts. Even in those States where the common law prevails, the courts hold that the land owner must improve his property in a reasonable manner. Hosher v. Railroad Co., 60 Mo. 329; Abbott v. Railroad Co., *supra;* Pettigrew v. Village of Evansville, 25 Wis. 229. "But persons exercising this right to improve and ameliorate the condition of their own land must exercise it in a careful and prudent way. * * * Each proprietor, in such case, is left to protect his own lands, against the common enemy of all, * * * so as to occasion no unnecessary inconvenience or damage to plaintiff." McCormick v. Railroad Co., 57 Mo. 433. See, also, Benson v. Railroad Co., 78 Mo. 504. This court said, in Livingston v. McDonald, 21 Iowa, 172, that "the rules of the civil law, * * * so far as they deny to the upper owner the right to collect the water in a body, or precipitate it in greatly increased or unnatural quantities upon his neighbor, to the substantial injury of the latter, we deem to be just and equitable; * * * and to this extent it is supported by the weight of authority in the common law courts." It also said: "We recognize the general rule that each may do with his own as he pleases, but we also recognize the qualification that each should so use his own as not to injure his neighbor." *Id.* 173. The same principle, as applied to the obstructing of a flow of surface water from the dominant to the servient estate, was recognized in Drake v. Railway Co., 63 Iowa, 303, 19 N. W. Rep. 215. The rule thus far adhered to by this court seems to be just, and we do not think there is sufficient cause to abandon it. The reasons for requiring that improvements on land be so made as to do no unnecessary injury to other lands apply with especial force to the construction of railways. These have become so necessary to modern civilization that their builders require and are given extraordinary privileges. One of the most important of these is the right to take and hold so much real estate as may be necessary for the location, construction, and convenient use of their railways. The primary object for which railways are built, is not to improve the particular tracts of land over which they pass. They are located, in part, with reference to the configuration of the country through which they pass, and the cost of construction. On the other hand, the general land owner has no voice in the location and construction of a railway. The burden which it may cast upon his land is not such as springs from those improvements which are designed to make the soil productive. Hence it is not a burden to which his estate is naturally servient. If his land be taken by the railway corporation, he is entitled to compensation for such injury as naturally results from the taking; but his land may not be taken, or, if taken, the railway may be so constructed over it as to cause damage which was not a necessary result of the taking. In such cases, if injury result from an improper construction of the railway, or from wrong in its operation, we see no reason why the railway corporation may not be made to respond in damages. In this case, defendant raised its embankment across the valley of Rock creek in such a manner as to turn all the water which flowed from above into the main stream. It was not practicable for plaintiff to counteract the effect of this by means of banks or ditches. Whatever its primary object may have been the fact is that defendant assumed control of the surface waters of the valley, changed their course, and compelled them to flow through an outlet of its own construction. Under these circumstances, we think it was the duty of defendant to construct and maintain its culvert so that its capacity should be sufficient to properly pass the waters of such floods as might reasonably be expected to occur. It would be most unreasonable to limit the obligation of defendant to the providing of such a culvert as would carry off the water which could be contained within the banks of the stream. It is contended by appellant that the case of Morris v. City of Council Bluffs, 67 Iowa, 344, 25 N. W. Rep. 274, is an au-

thority against the conclusion which we have reached. That case involved the right of a city to establish the grade of its streets, and its duty to provide permanent means for the escape of overflow water. It was in effect held that it was not the duty of the city to do more than provide temporary means for the escape of surface water in such cases, and that it was the duty of the lot owner to bring his lot up to grade, and thereby escape the overflow of which he complained. We do not think that the doctrine of that case is applicable to this. We are of the opinion that the jury were properly instructed in regard to the duties and liabilities of defendant.

2. Appellant complains of the giving of an instruction in the following language: "You are instructed that if Rock creek was a flowing stream the year round, with well defined banks, and that defendant constructed over said stream a culvert for the purpose of enabling its railway to pass over said water-course, and if you further find from the evidence that in times of high water at a point five hundred feet above said culvert, more or less, any portion of the water flowing in said creek in times of high water left its bank at such point above said culvert, and then, for a short distance, flowed over the land of plaintiff, but that the same was forced, by the embankment of defendant, back into the creek again, above said culvert, then such waters are not surface waters, but must be regarded by you, in the determination of this case in determining the sufficiency of said culvert, in the same light as if they had continuously flowed in said creek." The theory of the instruction appears to be that, when the overflowed water is turned back into the stream, it ceases to be surface water. This seems to us to be correct. Jones v. Hannovan, 55 Mo. 462. But, if the instruction will bear a different construction, no prejudice could have resulted from it under the facts of the case.

3. Complaint is made of the ruling of the court in admitting evidence as to the depreciation of the rental value of the premises in controversy on account of the alleged wrong of defendant. It may be conceded that there was error in admitting this evidence. But the court so charged the jury, as to the measure of plaintiff's recovery, as to necessarily withdraw from their consideration the evidence of which complaint is made. The error should therefore be deemed to be without prejudice. Harn v. Railway Co., 61 Iowa, 719, 17 N. W. Rep. 157; Lathrop v. Railway Co., 69 Iowa, 109, 28 N. W. Rep. 465.

4. It is also insisted that the jury was improperly instructed in regard to the measure of recovery. They were told that the measure of plaintiff's damages for each year was the difference between the fair market value of the land immediately before the injury each year, and its fair market value immediately after such injury; also that the term "land," so used, included the growing crops. This instruction accords with the rule announced in Drake v. Railway Co., 63 Iowa, 310, 19 N. W. Rep. 215, and is, we think, correct. The injury was not necessarily permanent because it was to real estate; hence there was no error in permitting the jury to estimate damages for each year of the overflow.

5. This action was commenced in February, 1886. The defendant pleaded the statute of limitations as a defense, and insist that plaintiff's right of action accrued in 1875, when the culvert was completed. The damages which might result from the character of the culvert could not have been foreseen and estimated at that time with any degree of accuracy, but depended, in part, upon the seasons. The jury found specially that the first flood after the culvert was built occurred in 1881. We therefore conclude that the plea of the statute was properly withheld from the jury. Drake v. Railway Co., 63 Iowa, 309, 19 N. W. Rep. 215; Van Orsdol v. Railroad Co, 56 Iowa, 470, 9 N. W. Rep. 379.

6. Misconduct on the part of the jury in arriving at their verdict is alleged. Each juror gave the sum he thought should be allowed for each separate year, and the amount of those sums was divided by twelve, and the quotient inserted in the verdict as the amount plaintiff was entitled to recover; but there was no agreement in advance to be bound by the result. After it was ascertained it was agreed to by the jurors. Hamilton v. Railroad Co., 36 Iowa, 35.

We have examined the record with care, but fail to discover any error prejudicial to defendant. The judgment of the district court is therefore affirmed.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ABATEMENT AND REVIVAL — Federal Courts — State Law. —— Congress has adopted the local law for the government of the federal courts in reviving suits abated by the death of parties. — *Warren v. Furstenheim*, U. S. C. C. (Tenn.), July 9, 1888; 35 Fed. Rep. 691.

2. ACCORD AND SATISFACTION— Payment of Part.—— Payment of the amount agreed on in full satisfaction of a note for a greater amount, made before its maturity, is sufficient consideration to support the accord and satisfaction. — *Boyd v. Moats*, S. C. Iowa, Sept. 8, 1888; 39 N. W. Rep. 237.

3. ACTION—Amendment.—— A party may amend the form of his action at any stage of the proceedings. — *Morse v. Whitcher*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 207.

4. ADMIRALTY—Mashall's Fees—Compromise. —— The sum paid a libelant in settlement of his claim, and not the amount claimed in the libel, is the basis on which to determine the marshal's commissions.—*Robinson v. Bags of Sugar*, U. S. D. C. (N. Y.), May 12, 1888; 35 Fed. Rep. 603.

5. ADMIRALTY—Parties — Non-joinder. —— A libel in admiralty on a charter party against respondent as sole owner of the steamship, it appearing that other parties own 46-64ths thereof, will be dismissed. — *Card v. Hines*, U. S. D. C. (S. Car.), June 19, 1888; 35 Fed. Rep. 598.

6. ADOPTION— Husband and Wife. —— A declaration of adoption by husband and wife is good as to the husband, though the statute makes no provisions for such a joint form of adoption. —*Abney v. DeLoach*, S. C. Ala., July 26, 1888; 4 South. Rep. 757.

7. APPEAL—Bill of Exceptions.——An appeal without any statement or bill of exceptions will be dismissed.— *State v. Lamb*, S. C. Nev., Aug. 9, 1888; 19 Pac. Rep. 33.

8. APPEAL— Former Decision — Review. —— Upon a second appeal, if the facts are the same, the former opinion is the law of the case and must govern it in all of its subsequent stages. — *Thompson v. Hawley*, S. C. Oreg , April 23, 1888; 19 Pac. Rep. 84.

9. APPEAL—New Trial.——Where the evidence is conflicting the granting or refusing of a new trial is within the discretion of the trial judge, and his ruling will not be disturbed on appeal although the jury have returned a special verdict. — *Chauvin v. Valiton*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 215.

10. APPEAL—Objections—Waiver. —— When the only reference in the record to the misconduct of an attorney in his remarks to the jury is in the motion for a new trial, it cannot be assigned for error. — *Gray v. Chicago, etc. R. R.*, S. C. Iowa, Sept. 7, 1888; 39 N. W. Rep. 213.

11. APPEAL— Proof of Service — Notice to Clerk. —— Where the transcript fails to show that the notice of appeal was returned after service to the clerk of the district court, the fact of the giving of notice may be shown by affidavit. — *Malcomson v. Graham*, S. C. Iowa, Sept. 6, 1888; 39 N. W. Rep. 179.

12. APPEAL—Review—Errors—Record.——A judgment will not be reviewed upon appeal on alleged errors in a referee's report which was not excepted to at the trial; the certificate of counsel as to what was said or done are not admissible.—*Magarity v. Shipman*, S. C. App. Va., Jan. 27, 1887; 7 S. E. Rep. 381.

13. APPEAL—Review—Guardian's Report. —— Where the evidence, on appeal from an order confirming a guardian's report, has been stricken from the record, the allowance of items of expenses by the guardian cannot be received. — *Berkholtz v. Richards*, S. C. Iowa, Sept. 5, 1888; 39 N. W. Rep. 167.

14. APPEAL — Statement of Evidence. —— Where defendant's statement on motion for a new trial avers that the foregoing is all of the evidence pertinent to the motion for new trial, and admits that plaintiff offered other testimony, on appeal it will not be presumed that the evidence not set out was not sufficient to sustain the judgment, when plaintiff fails to propose amendments. — *Bailey v. Papina*, S. C. Nev., Aug. 2, 1888; 19 Pac Rep. 33.

15. APPEAL—Statement of Facts — Filing. —— A case may be heard on appeal on the merits as disclosed by the record, though a statement of facts is not in the transcript. — *Swift v. Stine*, S. C. Wash. Ter., Feb. 1, 1888; 19 Pac. Rep. 63.

16. ARREST—Privilege.——An officer may arrest upon civil process an engineer running a railroad train. The engineer is not privileged from arrest. — *St. Johnsbury, etc. Co. v. Hunt*, S. C. Vt., Sept. 24, 1888; 15 Atl. Rep. 186.

17. ASSIGNMENT FOR BENEFIT OF CREDITORS — Setting Aside.——When a creditor procured a trust deed from a debtor to protect his debt, but on a threat by other creditors to put the debtor in bankruptcy the creditor and debtor conveyed all the latter's assets to an assignee for the benefit of his creditors, such creditor cannot afterwards sue to set aside such conveyance, and the release of its deed of trust are obtained by false and fraudulent representations.—*Moline R. Co. v. Wenger*, S. C. Mo., May 21, 1888; 8 S. W. Rep. 404.

18. ATTACHMENT—Insolvency— Receiptor.—— Where property is attached and a receiptor gives his bond to the officer and delivers the property to the debtor and afterwards the debtor becomes insolvent: *Held*, that the receiptor is not bound on his bond because the insolvency proceedings operate a dissolution of the attachment. — *Wright v. Dawson*, S. J. C. Mass., Oct 1, 1888; 18 N. E. Rep. 1.

19. ATTORNEY AND CLIENT — Compromise — Prosecution. —— Where in a suit for personal injuries the plaintiff proposed a compromise, and there is nothing to show it was collusive as to plaintiff's attorney, leave to the latter to prosecute, notwithstanding, will be refused. — *Swanson v. Chicago, etc. R. R.* U. S. C. C. (Minn.), June 28, 1888; 35 Fed. Rep. 638.

20. BANKS—Authority of Cashier.—— A bank cashier has no authority to transfer notes of the bank in payment of a deposit, and the depositor receiving the same is liable for the amount realized thereon. — *Schneitman v. Noble*, S. C. Iowa, Sept. 7, 1888; 39 N. W. Rep. 224.

21. BANKS—Cashier's Checks—Private Account.——A broker who receives checks drawn officially by a bank cashier on another bank for money due him from such cashier must be prepared to show as against the claim of the first bank, that its cashier had authority to draw such checks on his individual account. — *Anderson v. Kessain*, U. S. C. C. (N. Y.), Aug. 11, 1888; 35 Fed. Rep. 669.

22. BANKS—National — Shareholders. —— A married woman, who is shareholder in a national bank, is liable for an assessment on stock held by her. — *Witters v. Sowles* U. S. C. C. (Vt.), July 21, 1888; 35 Fed. Rep. 640.

23. BANKS AND BANKING—Estoppel.— -Circumstances stated under which a bank which has succeeded another bank, taken all its assetts and assumed all its liabilities, is estopped from denying its responsibility to a depositor of the old bank, whose deposit is regularly entered upon its books and transferred to those of its successor. — *Starr v. Stiles*, S. C. Ariz., Oct. 1, 1888; 19 Pac. Rep. 225.

24. BASTARDY— Evidence. —— Statement of written evidence held to be admissible in a case of bastardy. — *Sullican v. Hurley*, S. J. C. Mass., Oct. 1, 1888; 18 N. E. Rep. 8.

25. BOND—Title—Presumption—Laches. —— Circumstances stated under which it was held that where plaintiff, had a bond against the estate of a deceased person which had not been indorsed to him by the payee and many years had elapsed without suit by the plaintiff he might nevertheless maintain a suit on the bond, and a judgment in his favor would not be disturbed.— *Tate v. Tate*, S. C. App., Va., Aug. 9, 1888; 7 S. E. Rep. 352.

26. BOUNDARIES—Statutory Proceedings—Quarter Corner.——In proceedings under Pub. Laws 1874, ch. 8, to determine the location of a quarter corner, the court on appeal will not review the evidence if conflicting, the case not being triable *de novo*.— *Bohall v. Neiwalt* S. C. Iowa, Sept. 7, 1888; 39 N. W. Rep. 217.

27. BROKERS—Real Estate—Evidence.——In a suit by a real estate agent to recover commissions for the sale of realty, the admission of evidence that the exchange was affected by another agent is not error. — *Newlon v. Richey*, S. C. Iowa, Sept. 7, 1888; 39 N. W. Rep. 209.

28. CENSUS—Office and Officer—Statute—Construction. ——The statute of Rhode Island, requiring that a census should be taken on the 1st of June, 1885, and that the governor should appoint a superintendent of the census six months previous to the 1st of June, 1885 is merely directory, and the appointment of such superintendent made after the time indicated is valid.— *In re Census Superintendent*, S. C. R. I., April 24, 1885; 15 Atl. Rep. 205.

29. CHATTEL MORTGAGE—Description—Notice. —— A chattel mortgage describing property as one-six and one-half cut Plano harvester, though insufficient to impart constructive notice, may be introduced in an action against a constable for levying upon the property mortgaged, where the execution creditor has been shown to have had actual notice.— *Plano M. Co. v. Griffith*, S. C. Iowa, Sept. 7, 1888; 39 N. W. Rep. 214.

30. COLLISION—Steam and Sail—Evidence. ——Under the evidence it is held, that the tug is liable for the collision with the schooner.— *Mershon v. The Ramapo*, U. S. C. C (N. Y.), May 29, 1888; 35 Fed. Rep. 612.

31. COLLISION — Steamers — Delay in Signaling. —— Where two steamers have each other on the starboard side in going in oposite directions, when only 250 yards apart, they should keep their course, and in case one tries to cross the bows of the other, it must signal such intention in due time.— *The Farragut*, U. S. D. C. (N. Y.), June 8, 1888; 15 Fed. Rep. 617.

32. COLLISION — Steamers — Rule 19. —— Under the circumstances the ferry-boat Baltimore was bound to hold her course under rule 19, and was responsible for the collision, having changed her course. — *The Baltimore*, U. S. D. C. (N. Y.), Dec. 9, 1887; 35 Fed. Rep. 613.

33. COLLISION—Steamer — Sailing Vessel. —— In this case the steamer violated the law in not going at a moderate rate in a fog and in not slackening speed after hearing the bark's horn.— *The City of New York*, U. S. C. C. (N. Y.), June 25, 1888; 35 Fed. Rep. 604.

34. COLLISION— Tow — Negligence. —— The tow was 500 feet long and the channel narrow and dangerous, and the last boat struck a vessel lying at her dock: *Held*, that the tow was improperly made up, it passed too near the dock, and the last boat was in fault for permitting herself to be so towed. — *The Nettie*, U. S. D. C. (N. Y.), July 3, 1888; 39 N. W. Rep. 615.

35. CONSTITUTIONAL LAW— Corporations—Statutes.— Statutes of Montana authorizing the formation of corporations for business purposes is not in conflict with the organic law governing that territory and limiting the powers of its legislature. — *Carver, etc. Co. v. Hulme*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 213.

36. CONSTITUTIONAL LAW—Evidence—Statute. — The statute of the State of Virginia which makes the production of bonds with the interest coupons cut off evidence that the coupons were actually detatched, does not conflict with that provision of the constitution of the United States which prohibits any State from enacting any law which impairs the obligation of contracts. — *Commonwealth v. Booker*, S. C. App. Va., Jan. 13, 1887; 7 S. E. Rep. 381.

37. CONSTITUTIONAL LAW — Oleomargerine — Police Power.——The regulation of the sale of imitation butter is within the police powers of the State, which may be constitutionally exercised on that subject. — *State v. Marshall*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 210.

38. CONTRACT— Interpretation. —— A partner transferred to plaintiff by writing the undivided one-half interest in the livery stock, horse, buggies, etc. The firm owned 17 horses used in the livery business and a stallion kept in a separate barn: *Held*, that the partner's interested in the stallion, barn and moneys due for service of the stallion was conveyed. — *Schuler v. Dutton*, S. C. Iowa, Sept. 8, 1888; 39 N. W. Rep. 239.

39. CORPORATION—Creditor— Execution. —— A judgment creditor of a stockholder cannot take upon execution his debtors share of the real estate of the corporation until that body has been duly dissolved. — *Princeton, etc. Co. v. First Nat. Bank*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 210.

40. CORPORATION—Insolvency — Receiver. ——Circumstances stated under which the beneficiaries under an imperfect contract and conveyance by a corporation who had not performed the acts required by the conveyance, could not hold the property as against a receiver duly appointed to take charge of the assets of the corporation which was insolvent. — *Bates v. Elmer, etc. Co.*, N. J. Ct. Chan. Sept. 12, 1888; 15 Atl. Rep. 246.

41. Costs — Security. —— Under Wisconsin laws, an order requiring the plaintiff to give security for costs, though made upon the motion of the defendants, is within the discretion of the court.— *Joint School District v. Kernen*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 131.

42. COST— Security for Cost — Court — Term of Court. —— The day fixed by the statute for the commencment of a term of the court is the first day of that term, and all orders about costs and security for costs referring to "the first day of the term relate to that day and not to the day to which the judge has adjourned the court.— *McKeller v. Parker*, S. C. S. Car., Sept. 20, 1888; 7 S. E. Rep. 295.

43. COUNTIES — Suits Against. —— When a county deals in its corporate capacity, it may be sued the same as a natural person, but when the sovereign power of the State is exercised through a county organization, a claim to compensation growing out of such action must be adjusted as pointed out by law. — *Walker v. Wasco County*, S. C. Oreg., Feb. 9, 1888; 19 Pac. Rep. 81.

44. COURTS—Federal—Following State Practice.——A suit at law in a State court, where the distinctions between law and equity are obliterated, transferred to a federal court must be tried according to the principles of common law, though if properly formed the petition would have stated a case for equitable relief. — *Potts v. Accident I. Co.*, U. S. C. C. (N. Y.), July 18, 1888; 35 Fed. Rep. 566.

45. CRIMINAL LAW—Appeal- Bond—Statute.—— Construction of Montana statutes relative to appeals in criminal cases, the bonds required and the conditions thereto attached. —*Territory v. Milroy*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 209.

46. CRIMINAL LAW—Courts— Jurisdiction. —— Under the statute of Virginia a person indicted for a capital offense may, upon his arraignment in the county court, demand to be tried in the circuit court, but the objection is not good in arrest of judgment that he had been refused that removal, although he had demanded it upon his arraignment but after he had pleaded not guilty to the charge.—*Sutton v. Commonwealth*, S. C. App. Va., July 19, 1888; 7 S. E. Rep. 323.

47. CRIMINAL LAW—Embezzlement — Indictment.—— An indictment which charges that an administrator received the sum of $1,794, and only accounted for $1,700, does not without further inculpatory facts charge the crime of embezzling $194.—*People v. Gale*, S. C. Cal., Sept. 24, 1888; 19 Pac. Rep. 231.

48. CREDITOR'S BILL—Decree—Equity. ——A decree against a decendent's estate in a creditor's bill is not erroneous because it is rendered in favor of a receiver instead of the complainant as the effect of the decree is to retain the property *in custodia legis*. — *Harman v. McMullin*, S. C. App. Va., Aug. 2, 1888; 7 S. E. Rep. 349.

49. CREDITOR'S BILL—Judgment—Consolidation.—— Where five persons hold judgments against the same debtor and one has a lien superior to all the others, he may maintain a bill for the consolidation of all the causes for an accounting, the sale of the land of the debtor, the marshalling of assets and the satisfaction of the judgments, and this he can do although the debtor be living.—*Preston v. Aston's Admr.*, S. C. App. Va., July 26, 1888; 7 S. E. Rep. 344.

50. CRIMINAL LAW—Appeal—Attorney. —— An attorney appointed by the trial court to defend a person under indictment may prosecute a writ of error.—*State v. Williamson*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 135.

51. CRIMINAL LAW—Indictment—Grand Jury.——The act of 1886, requiring that four members of a grand jury of five must concur in finding an indictment is not unconstitutional.—*State v. Salts*, S. C. Iowa, Sept. 5, 1888; 39 N. W. Rep. 167.

52. CRIMINAL LAW — Indictment — Separate Offenses. —— In Alabama, on an indictment charging burglary and grand largeny in one count, there may be a conviction of either offense, or a general conviction, with only one punishment. — *Robinson v. State*, S. C. Ala., July 26, 1888; 4 South. Rep. 774.

53. CRIMINAL LAW—Indictment—Statute. —— Statement of evidence that will not sustain an indictment § General Statutes, ch. 274, § 10 for enticing female, etc.—*State v. Brow*. S. C. N. H., July 19, 1888; 15 Atl. Rep. 216.

54. CRIMINAL LAW—Instructions — Evidence. —— To instruct that, though defendant may not have been present, yet, if he advised, aided, or abetted the commission of the crime, he is guilty, where there is no evidence of any such advice or acts, is error.— *Miller v. Ter.*, S. C. Wash. Ter., Feb. 2, 1888; 19 Pac. Rep. 50.

55. CRIMINAL LAW—Homicide—Trespass on Land.—— A, claiming to own land in the possession of B, armed himself, and went on the land to cut hay. B armed himself and went to warn A away, and in the affray A was killed: *Held*, that A's entry was a trespass, which B had a right to resist.— *White v. Ter.*, S. C. Wash. Ter., Jan. 25, 1888; 19 Pac. Rep. 37.

56. CRIMINAL LAW—Juror—Voir Dire.—— The refusal to the defendant of the right to examine a juror is not prejudicial to him if the objection is withdrawn and the examination is permitted and actually takes place. Ruling on the following subjects: impeachment, testimony on former trial, testimony before coroner, coroner reading testimony, testimony itself admissible, right to rebut, murder, malice, presumption, trial, absence of prisoner, stenographer's notes, instruction, bias of counsel, courts errors, juror's personal knowledge, comments on evidence, remarks of court. — *State v. Jones*, S. C. S. Car., Sept. 17, 1888; 7 S. E. Rep. 296.

57. CRIMINAL LAW— Rape — Character of Prosecutrix. —— On a trial for rape, the character of the prosecutrix relative to chastity may be shown by her general reputation in that respect or by proof of her previous intercourse with the defendant, but not with other persons. — *McQuirk v. State*, S. C. Ala., July 17, 1888; 4 South. Rep. 775.

58. DAMAGES — Personal Injury —Expectancy of Life. —— Where the injury to plaintiff is shown to be permanent, the Carlisle tables are admissible to show plaintiff's expectancy of life.—*Chase v. Burlington, etc. R. R.*, S. C. Iowa, Sept. 7, 1888; 39 N. W. Rep. 196.

59. DEED — Estate Conveyed. —— A deed was made, conveying land to A and in consideration that A should perform certain stipulations, but no right of entry was reserved, nor was it provided that the estate should cease on non-performance: *Held*, that an absolute estate was conveyed. — *City of Portland v. Terwilliger*, S. C. Oreg., Feb. 15, 1888; 19 Pac. Rep. 90.

60. DESCENT AND DISTRIBUTION — Adoption and Adopted Child—Part Performance—Contract. —Where a father gives his child when very young to his sister upon condition that she should bring it up as her own, and the sister performs that condition and by her will gives her personal property to the child, but after making the will buys land and dies without testamentary disposition of it: *Held*, that the child was an adopted child and inherited the land as such, there being a part performance of the agreement between her father and his sister.—*Van Line v. Van Line*, N. J. Ct. Chan., Sept. 12, 1888; 15 Atl. Rep. 249.

61. DESCENT AND DISTRIBUTIONS — Legitimacy — Evidence.——Circumstances and evidence stated in which it was held that the legitmacy of a child which was disputed was established by sufficient proof. — *Scott v. Hillenberg*, S. C. App. Va., Aug. 16, 1888; 7 S. E. Rep. 377.

62. DIVORCE—Adultery—Cruelty. —— A divorce may be refused a husband for his wife's adultery, when he has been guilty of cruel and inhuman treatment of her, though none of the facts are set forth, for which in cases of adultery divorce may be refused under the statute.—*Pease v. Pease*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 133.

63. DIVORCE—Pleadings— Amendment. —— To allow defendant, in an action for divorce and division of property, to amend his answer, by making a denial of an allegation concerning the property more specific, is not an abuse of the discretion given trial courts regarding amendments.—*Sharon v. Sharon*, S. C. Cal., Sept. 22, 1888; 19 Pac. Rep. 230.

64. DRAINAGE — Constitutional Law — Assessment — Statute.——A statute of Indiana which authorizes certain officers to keep public ditches in repair and assess the cost thereof upon property benefited is not unconstitutional, as it provides a method of contesting the assessment by appeal.—*Johnson v. Lewis*, S. C. Ind., Sept. 20, 1888; 18 N. E. Rep. 7; *Dunkle v. Herron*, S. C. Ind , Sept. 22, 1888; 18 N. E. Rep. 12.

65. EJECTMENT— Adverse Possession—Boundaries.—— Where by mistake defendant's fence included part of plaintiff's land, the burden is on the defendant to prove adverse possession under the claim of right.— *Sweney v. Bruns*, S. C. Iowa, Sept. 4, 1888; 39 N. W. Rep. 165.

66. EMINENT DOMAIN — Damages — Evidence. —— A deed for land sold in the vicinity of the condemned land is no proof of the damages sustained by condemnation, no proof being given of the actual consideration paid. — *Esch v. Chicago, etc. R. R.*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 129.

67. EMINENT DOMAIN—Public Use—Canal. —— Under the Oregon constitution, land may be condemned for a canal constructed by a lumber company to carry lumber to a city and to supply the city with water. — *Dallas L. Co. v. Urquhart*, S. C. Oreg., 1888; 19 Pac. Rep 78.

68. EQUITY— Deed — Rescission.—— A conveyed his farm to his minor child without consideration, and continued to live on it. His child lived with him and was well treated. Shortly after she came of age she reconveyed the farm to A: *Held*, that equity would not set aside her deed. — *Knox v. Singmaster*, S. C. Iowa, Sept. 6, 1888; 39 N. W. Rep. 183.

69. EQUITY—Jurisdiction — In Personam.——A court having jurisdiction of the parties may grant relief from the forfeiture of a mining lease, though the mines are situated in another State.—*Sunday L. M. Co. v. Wakefield*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 136.

70. EQUITY—Rescission—Undue Influence.——In this action to set aside a conveyance of a farm to his son by an old man on the ground of incapacity and undue influence, it was held that the conveyance was valid. — *Marshall v. Marshall*, S. C. Iowa, Sept. 7, 1888; 39 N. W. Rep. 230.

71. ESCHEAT—Notice—Publication — Sunday. —— A notice of escheat is not rendered invalid by the fact that it is published in a Sunday newspaper. — *Eason v. Witcofskey*, S. C. S. Car., Sept. 20, 1888; 7 S. E. Rep. 291.

72. ESTOPPEL — Administration. —— Circumstances stated under which it was held that one who claimed a legacy under an assignment from a legatee who afterwards died, is not estopped as against the credito

such legatee from claiming the legacy, because as administrator of the legatee he had stated the legacy as part of the estate of his intestate and included it in his inventory. — *Dunham v. Ewen*, N. J. Ct. Chan., Sept. 7, 1888; 15 Atl. Rep. 245.

73. EVIDENCE— Admissions — Officer of Corporations. —— Declarations of the president of a corporation made long after a note was indorsed to it, and six months after suit brought, that the corporation had no interest in it, are not admissible, without evidence, that he had authority to make them, or had a duty in the premises, or was referred to for information. — *Tuthill Spring Co. v. Shaver W. Co.*, U. S. C. C. (Iowa), Feb. 7, 1888; 35 Fed. Rep. 644.

74. EVIDENCE—Gift — Declarations. —— In an action on a note by the payee against the maker, declarations of plaintiff to defendant of an intention to present him with the note having been admitted, other declarations of plaintiff just prior thereto that he intended to collect the note by legal means, are admissible. — *Sherman v. Sherman*, S. C. Iowa, Sept. 7, 1888; 39 N. W. Rep. 232.

75. EXECUTION—Partnership.——Under an execution against two persons described as partners the individual property of either may be seized and sold.—*Porter v. Johnson*, S. C. Ga., July 11, 1888; 7 S. E. Rep. 317.

76. EXECUTION — Redelivery Bond — Damages. —— Where the sheriff, in replevin by execution defendants to recover property levied on, recovers judgment for the value of the property, which is paid, the execution plaintiff in an action on the redelivery bond can recover no more than nominal damages.—*Stuart v. Trotter*, S. C. Iowa, Sept. 7, 1888; 39 N. W. Rep. 212.

77. EXECUTORS—Appointment—Attack. —— When an administrator appears to have been duly appointed by the court having exclusive jurisdiction, his appointment cannot be attacked collaterally in a suit brought by him.—*Francisco v. Chicago, etc. R. R.*, U. S. C. C. (Iowa), July 24, 1888; 35 Fed. Rep. 647.

78. EXECUTORS—Letters Testamentary. —— When a will is proven, it is the duty of the court to grant letters testamentary to the person named in the will, upon his application, who is not disqualified by the statute. — *Holladay v. Holladay*, S. C. Oreg., March 19, 1888; 19 Pac. Rep. 81.

79. EXECUTORS AND ADMINISTRATORS — Accounting— Notice— Distribution — Collateral Attack—Statute.—— Statement of proceedings required by the statute of Indiana for the final account of an administrator. If due notice has been given an accounting though irregular is not subject to collateral attack. — *Jones v. Jones*, S. C. Ind., Sept. 26, 1888; 18 N. E. Rep. 20.

80. EXECUTOR AND ADMINISTRATOR— Settlement.—— Where one of the distributees of a decedent's estate survives her husband but dies leaving an heir, both her personal representatives and her heir are proper parties to a suit in equity for a settlement of such estate. —*Robertson v. Gillenwaters*, S. C. App. Va., July 26, 1888; 7 S. E. Rep. 371.

81. EXEMPTIONS—Landlord's Lien. —— The law giving lessors of store-houses a lien for rent on the goods of their tenants, makes such lien superior to the exemption allowed by the State constitution, and is valid.—*Ex parte v. Barnes*, S. C. Ala., July 26, 1888; 4 South. Rep. 769.

82. FEES — District Attorneys — Order. —— It is the duty of the circuit courts at each term to ascertain the fees which the district attorney is entitled to for the term, and to direct the entry of an order that the same be paid. — *Colvig v. County of Klamath*, S. C. Oreg., April 23, 1888; 19 Pac. Rep. 86.

83. FRAUD—Fraudulent Conveyance— Deed of Trust—Trust. —— A deed of trust is not rendered fraudulent as to creditors by a stipulation in it that the grantor shall have the privilege upon payment regularly of the interest of postponing the date of payment of the debt from year to year in all not to exceed five years.—*Keagy v. Trout*, S. C. App. Va., September Term, 1888; 7 S. E Rep. 329.

84. FRAUD — Statute of. —— Where a man orally promised a woman as an inducement for her to marry him, that he would convey to her certain lands, and instead of doing so conveyed them to his son and afterwards deserted his wife, it was held upon a complaint by the wife against the grantee of her husband, for specific performance of the oral contract, that the grantor having induced the woman to change her condition by marriage with him, the statute of frauds did not apply.—*Peck v. Peck*, S. C. Cal., Sept. 22, 1888; 19 Pac. Rep. 227.

85. FRAUDS — Statute of — Debt of Another. —— A promise to pay the debt of another, when made to the debtor, is not within the statute of frauds. — *Clark v. Jones*, S. C. Ala., July 26, 1888; 4 South. Rep. 771.

86. FRAUDS— Statute of—Land — Option to Purchase. —— Under the Alabama law, the consideration paid for, and the possession taken under, a lease containing an option of purchase, are not sufficient to make the oral sale of the land valid, where, upon the election, there is no visible change in the possession. — *Linn v. McLean*, S. C. Ala., July 17, 1888; 4 South. Rep. 777.

87. FRAUDS—Statute of — Leases — Part Performance. —— Section 3665 Code Iowa, making exceptions under the statute of frauds does not apply to leases for over one year. — *Thorp v. Bradley*, S. C. Iowa, Sept. 6, 1888; 39 N. W. Rep. 177.

88. FRAUD — Statute of — Part Payment. —— In an action by a vendor against the vendee of corn for refusal to accept delivery thereof according to the terms of the contract, he may well show that the vendee furnished the sacks in which the corn should be placed, and that the use of the sacks was a part payment which took the case out of the statute of frauds.—*Weir v. Hudnut*, S. C. Ind., Sept. 27, 1888; 18 N. E. Rep. 24.

89. FRAUDS—Statute of—Part Performance.——A dismissed certain suits against B, and agreed that the money involved in another suit should be paid to B, on B's agreement that he would convey a certain farm to A on A's marriage to a certain lady. A married the lady: *Held*, that a specific performance of his contract would be decreed against B.— *Slingerland v. Slingerland*, S. C. Minn., Sept. 10, 1888; 39 N. W. Rep. 146.

90. FRAUDULENT CONVEYANCES — Creditor—Intent.—— A creditor, who receives a conveyance from his debtor in good faith and without intent to defraud the other creditors, will be protected against them, though he had knowledge that the debtor was in failing circumstances. — *Rockford B. & S. M. Co. v. Mastin* S. C. Iowa, Sept. 7, 1888; 39 N. W. Rep. 219.

91. GARNISHMENT—Service of Allegations.——Unless the plaintiff serve written allegations and interrogatories on the garnishee within the time limited for him to answer, or within the time specified in the order, there is no foundation for any further proceedings against the garnishee.—*Case v. Noyes*, S. C. Oreg., June 7, 1888; 19 Pac. Rep. 104.

92. GUARDIAN AND WARD—Sale of Realty.——The failure of a guardian to give bond upon the sale of his ward's land, as required by Iowa law, is not such defect that the sale can be attacked collaterally. His failure to verify his petition for an order of sale does not invalidate the sale.—*Hamiel v. Donnelly*, S. C. Iowa, Sept. 7, 1888; 39 N. W. Rep. 210.

93. HABEAS CORPUS—Custody of Child—Parents.—— In this case it was adjudged that the mother was unfit to have custody of her child, and it was awarded to the father; the parents were divorced.—*Fawar v. Fawar*, S. C. Iowa, Sept. 7, 1888; 39 N. W. Rep. 226.

94. HIGHWAY — Personal Injuries — Counsel—Statute. ——Under the statute requiring claims for injuries caused by defects of highways within ten days after such injury, a party who neglects to file his claim within the prescribed time will be excused if his counsel was ignorant of the law on that subject.—*Kelsea v. Manchester*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 206.

95. HOMESTEAD—Abandonment.——Under the evidence it was held that the defendant had not abandoned his homestead right.—*Stewart v. Rhoades*, S. C. Minn., Sept. 5, 1888; 39 N. W. Rep. 141.

96. HUSBAND AND WIFE—Contract—Promissory Note.——A wife may bind herself by a promissory note to pay off a mortgage on personal property bought by the husband.—*Jones v. Holt*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 214.

97. HUSBAND AND WIFE—Conveyances Between.——A conveyance of land from husband to wife without the intervention of a third party will not pass the legal title, but will be upheld in equity if made in good faith and upon valuable consideration.—*Smith v. Seiberling*, U. S. C. C. (Mo.), Aug. 6, 1888; 35 Fed. Rep. 677.

98. HUSBAND AND WIFE—Separate Estate.——Circumstances stated under which the profits of a business carried on by an insolvent husband in the name of his wife were held to be a charge upon her separate estate, so far as they were applied to the improvement thereof.—*Shay v. Dickson*, N. J. Ct. Chan.. Sept. 12, 1888; 15 Atl. Rep. 252.

99. HUSBAND AND WIFE—Separate Estate—Statute.——Under the statutes of Virginia a promissory note assigned to a wife after her marriage becomes part of her separate estate.—*Tate v. Perkins*, S. C. App. Va., July 19, 1888; 7 S. E. Rep. 328.

100. HUSBAND AND WIFE—Separate Estate—Statute.——A married woman who causes to be put upon record a deed to a separate property, sufficiently complies with the act of Montana exempting her property from her husband's debts.—*Montana, etc. Co. v. Colter*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 216.

101. HUSBAND AND WIFE—Settlement—Evidence.——Circumstances stated under which it was held that the evidence produced was not sufficient to set aside a settlement made by a husband upon his wife at the instance of an alleged creditor whose demands were not well founded.—*Waller v. Johnson*, S. C. App. Va., Feb. 24, 1887; 7 S. E. Rep. 382.

102. INDIANS—Umatilla—Power of President.——The president is authorized to make rules for the government of the Indians on the Umatilla reservation, including the establishment of an Indian court and police.—*U. S. v. Clapox*, U. S. D. C. (Oreg.), July 18, 1888; 35 Fed. Rep. 575.

103. INJUNCTIONS—Directors—Validity of Acts.——An injunction will be granted to prevent directors of a corporation, alleged not to have been legally elected, from selling the stock of complainant for not paying assessments and from making other calls, and the validity of their election will be examined into.—*Moses v. Tompkins*, S. C. Ala., July 26, 1888; 4 South. Rep. 763.

104. INSURANCE—Mutual Benefit—Public Policy.——The by-law of a railroad relief association, requiring its members to release the railroad from any claim for damages before applying to the association for relief, is not against public policy.—*Owens v. Baltimore, etc. R. Co.*, U. S. C. C. (Ohio), Aug. 1, 1888; 35 Fed. Rep. 715.

105. INTOXICATING LIQUORS—Cider.——Cider cannot lawfully be sold where the law prohibits the sale of alcohol or any spirituous, ardent, vinous, malt or fermented liquors.—*Eureka, etc. Co. v. Gazette, etc. Co.*, U. S. C. C. (Ark.), June 30, 1888; 35 Fed. Rep. 570.

106. INTOXICATING LIQUORS—Fines—Homesteads.——Code Iowa, § 1538, rendering premises, used with the consent of the owner for the sale of intoxicating liquors, liable for the fines and costs imposed for such use, applies to homesteads.—*McClure v. Braniff*, S. C. Iowa, Sept. 6, 1888; 39 N. W. Rep. 171.

107. INTOXICATING LIQUORS—Indictment—Bar-tender.——An indictment for keeping intoxicating liquors for sale may be maintained against a bar-tender in the employ of the owner of such liquors.—*State v. McGuire*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 213.

108. INTOXICATING LIQUORS—Indictment—Statute.——Under the statute law of New Hampshire, a building kept for the illegal sale of intoxicating liquors is a nuisance and may be abated as such. An indictment as such under this statute is fatally defective if it fails to state that the building was used for that purpose, and that the sales were illegal.—*Duke v. Marston*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 222.

109. INTOXICATING LIQUORS—Local Option Law.——The local option law of Washington Territory, allowing precincts by vote to prohibit the sale of liquor, is invalid.—*Lessman v. Ter.*, S. C. Wash. Ter., Jan., 1888; 19 Pac. Rep. 63.

110. INVENTIONS—Corn-shellers.——Patent 132,128 to Henry A. Adams for corn-shellers, is infringed by a shaft thickly set with spikes or projections revolving over the throat of a low feed machine.—*Adams v. Keystone, etc. Co.*, U. S. C. C. (Ill.), June 30, 1888; 35 Fed. Rep. 579.

111. INVENTIONS—Counties—Actions Against.——A claim against a county for using a patent must, under Iowa law, be presented to the board of supervisors before suit can be brought, though a certain royalty has been uniformly demanded and collected from users of the patented device.—*May v. Jackson County*, U. S. C. C. (Iowa), Aug. 9, 1888; 35 Fed. Rep. 710.

112. INVENTIONS—Damages—Royalty.——An allowance by a circuit court of three dollars per machine as damages, not made on the basis of a customary charge, is not such an establishment of a fixed royalty as will entitle the owner of the patent who, in another suit, has recovered damages at the same rate, to interest thereon from the date of infringement.—*Graham v. Piano, etc. Co.*, U. S. C. C. (Ill.), June 7, 1888; 35 Fed. Rep. 597.

113. INVENTIONS—Fire-proof Columns.——Patent 154,852 to Drake and Wright for fire-proof columns is void. Patents 191,662 and 191,887 for improvements for fire-proof columns are not infringed by a column having no dovetailed recess between the gores and ends of the webs, nor the grooved gore.—*Wight, etc. Co. v. Chicago, etc. Co.*, U. S. C. C. (Ill.), June 30, 1888; 35 Fed. Rep. 582.

114. INVENTIONS—Foreign Patents.——Rev. Stat. U. S., § 4887, does not apply to a patent issued subsequent to the filing of application and provisional specification for an English patent on the same invention, but prior to its issuance, although such patent was antedated as of the date of application.—*Seibert, etc. Co. v. William, etc. Co.*, U. S. C. C. (Ohio), May 23, 1888; 35 Fed. Rep. 591.

115. INVENTIONS—Freeing Water Mains.——Patent 312,158 to Samuel B. Peeney, for freeing sections, mains and strainers from sand and leaves, is not anticipated by a method of flushing the mains and reversing the current by gravitation.—*Peeney v. City of Lakeview*, U. S. C. C. (Ill.), June 30, 1888; 35 Fed. Rep. 586.

116. INVENTIONS—Gas Machine—Stare Decisis.——Patent 333,862 to Joshua Kidd, for attachment to gas fixtures will be held void for want of novelty under the decision of another circuit. Patent 247,925 to Joshua Kidd, is not infringed by a similar shell-shaped device, through which the gas is made to pass on its way to the carbureter, but which disk contains no corrugations or series of channels.—*Kidd v. Ransom*, U. S. C. C. (Ill.), June 30, 1888; 35 Fed. Rep. 588.

117. INVENTIONS—Injunction—Bond.——An injunction in a patent case was issued on plaintiff giving bond. On the final hearing the bill was dismissed for want of equity: *Held*, that plaintiff was liable on the bond.—*Tobey, etc. Co. v. Colby*, U. S. C. C. (Ill.), Feb. 20, 1888; 35 Fed. Rep. 592.

118. JAIL—Prisoner—Costs.——Construction of Montana statutes regulating the allowance to jailers for the support of prisoners.—*Lloyd v. Silver Bow County*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 217.

119. JUDGMENT—Assignment—Tort.——In an action for a tort the plaintiff cannot assign his claim after a verdict in his favor has been rendered and before judgment has been entered.—*Gamble v. Central, etc. Co.*, S. C. Ga., July 11, 1888; 7 S. E. Rep. 315.

120. JUDGMENT — Collateral Attack — Justice of the Peace.—— The judgment of a justice of the peace cannot be collaterally attacked on the ground that the judgment was merged in a former judgment, nor because the defendant did not reside in the township, nor because the land sold under it was sold *en masse*, the period for redemption having expired. — *Gregory v. Boiver*, S. C. Cal., Sept. 25, 1888; 19 Pac. Rep. 232.

121. JUDGMENT—Res Adjudicata.——Where A obtains judgment in the special statutory action against the attaching creditor, and the sheriff for the return of his goods attached as the property of B, such judgment is a bar to another action against the sheriff, the attaching creditor and the sureties on the indemnity bond, to recover damages for the trespass. — *Dawson v. Baum*, S. C. Wash. Ter., Jan. 30, 1888; 19 Pac. Rep. 46.

122. JUDGMENT — Res Adjudicata — Specific Performance. —— Where a decree has been rendered setting aside a deed executed while the grantor was insane, is no bar to a bill for the specific performance of an antecedent contract made by the grantee while sane, to convey the same land to the same grantee. — *Fishburne v. Ferguson*, S. C. App. Va., Aug. 23, 1888; 7 S. E. Rep. 361.

123. JUDICIAL NOTICE—Territorial Statutes.—— In an action for personal injuries resulting in the death of plaintiff's estate, removed from a State court to the federal court, the court will take judicial notice of a territorial statute giving a right of action to the representatives of the deceased. — *Breed v. Northern P. R. R.*, U. S. C. C. (Minn.), June 19, 1888; 35 Fed. Rep. 642.

124. JUDICIAL SALE—Setting Aside—Estoppel In Pais—Evidence. —— Circumstances stated under which it was held that the evidence failed to sustain a bill to set aside a judicial sale, it appearing in effect that the complainant was estopped by his acquiescence in the sale, and that the evidence sustaining his claim which was all his own testimony was contradicted by other competent witnesses.— *McGee v. Johnson*, S. C. App. Va., July 19, 1888; 7 S. E. Rep. 374.

125. LANDLORD AND TENANT—Leases — Insolvency.—— A national bank took a long lease, but soon became insolvent and was dissolved. The rent was paid while the bank was in possession, and the receiver refused to take possession. *Held*, that the lessor was not entitled to damages out of the assets.— *Fidelity S. D. & T. Co. v. Armstrong*, U. S. C. C. (Ohio), May 11, 1888; 35 Fed. Rep. 567.

126. LIMITATIONS—Action— Defective Notice.—— The delivery of a notice of an action to the sheriff for service, in which the opening day of the term of court, on which day by rules of court all parties to actions must be present, was wrongly stated, does not constitute the beginning of an action so as to arrest the running of the statute of limitations, under Iowa law.— *Fernekes v. Case*, S. C. Iowa, Sept. 8, 1888; 39 N. W. Rep. 238.

127. LIMITATIONS — Principal and Surety. —— A joint maker, who is in fact surety on a note payable to a corporation, has his action for indemnity upon an unwritten contract which, under Iowa law, is barred in five years.—*Hanah v. Jacobs*, S. C. Iowa, Sept. 6, 1888; 39 N. W. Rep. 187.

128. LIMITATION—Statute of—Construction— Infancy—Trust. —— Circumstances stated under which it was held that a beneficiary of a trust who at the age of 18 joined in the discharge of the trustee cannot, under the code of South Carolina after attaining her majority, maintain an action to charge the trustee with the amount due to her. — *Anderson v. Simms*, S. C. S. Car., Sept. 21, 1888; 7 S. E. Rep. 289.

129. LIMITATION OF ACTIONS — Pledges. —— Where certificates of stock are pledged for existing indebtedness and to secure future advances, the statute of limitations will not run till the pledge repudiates the trust and gives notice, that in default of payment he will sell the property. — *Gilmer v. Morris*, U. S. C. C. (Ala.), June 15, 1888; 35 Fed. Rep. 682.

130. MANDAMUS—Street Crossings— Consolidation.—— Where two railroads cross a street near together, *mandamus* proceedings to compel one of them to build a bridge over its track may be ordered tried with similar proceedings against the other.—*State v. Minneapolis, etc. R. R.*, S. C. Minn., Sept. 14, 1888; 39 N. W, Rep. 153.

131. MASTER AND SERVANT — Independent Contractor —Negligence. —— A railway employed a contractor to build its road and agreed to furnish the motive power and operate the construction trains. He was to furnish all material: *Held*, that the company was not liable for injuries caused by the negligence of the engineer on the construction train in too rapidly operating the train.— *Miller v. Minnesota, etc. R. R.*, S. C. Iowa, Sept. 6, 1888; 39 N. W. Rep. 188.

132. MASTER AND SERVANT—Negligence—Pleading.—— In an action by a servant against the master for personal injuries, a declaration charged in one count that it was the master's duty to provide for the safety of the servant, and in the second count that it was the master's duty to provide safe and suitable machinery for the business carried on; *Held*, that the declaration charging a breach of these duties stated a sufficient cause of action.— *Southwest, etc. Co. v. Smith's Admr.*, S. C. App. Va., Aug. 23, 1888; 7 S. E. Rep 365.

133. MASTER AND SERVANT—Risk— Assumption.——A servant of full age and ordinary capacity cannot recover damages for injuries caused by the use of a ladder, the defect of which was known to him and the master and by neither of them regarded as dangerous. *Jenney, etc. Co. v. Murphy*, S. C. Ind., Sept. 29, 1888; 18 N. E. Rep. 28.

134. MECHANIC'S LIEN—Construction of Law. —— Construction of mechanic's lien law of Oregon, and the effect of the change thereof on contracts then pending. — *Anistie v. Kohn*, S. C. Oreg., June 7, 1888; 19 Pac. Rep. 97.

135. MECHANIC'S LIEN — Promoters of Corporation.—— A purchased land and erected a building thereon, having an agreement with others to convey it to a land company, which he and they were about to form, so soon as the company was formed: *Held*, that A after a sale thereof to the company was not entitled to a mechanic's lien on the building. — *Littleton S. B. v. Osceola L. Co.*, S. C. Iowa, Sept. 6, 1888; 39 N. W. Rep. 201.

136. MINES—Leases—Surface — Owners. —— A lease granted the right to mine all the coal found under certain premises, over which a railroad operated, to continue fifteen years, unless all the coal was sooner mined out: *Held*, that the leasees could only mine such coal as could be removed without injury to the surface. — *Mickle v. Douglass*, S. C. Iowa, Sept. 6, 1888; 39 N. W. Rep. 198.

137. MINES—Mining Locations— Tunnel—Statute.—— Construction of Montana mining laws, rulings on the subject of the rights of owners of tunnels senior and junior, and of the affect of the prior discovery of lodes and veins. — *Hope, etc. Co. v. Brown*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 218.

138. MORTGAGE—Absolute Deed — Evidence.—— When the evidence to show that an absolute deed was intended as a mortgage is conflicting and much of it unsatisfactory, declarations of the deceased grantee, it is not sufficient proof. — *Ensminger v. Ensminger*, S. C. Iowa, Sept. 7, 1888; 39 N. W. Rep. 208.

139. MORTGAGE—Cancellation—Fraud—Estoppel— Executors and Administrators. —— The administrator of the assignee of a mortgage is not estopped by the unauthorized act of his attorney in permitting the cancellation of the mortgage so as to be in a mortgage held by third persons, from contesting any rights that may have been acquired by purchasers under such mortgage so held by third persons. — *Baldwin v. Howell*, N. J. Ct. Chan., Sept. 7, 1888; 15 Atl. Rep. 236.

140. MORTGAGES—Foreclosure—Jurisdiction.——Under Oregon law, a mortgage is foreclosed by a suit in equity, which jurisdiction is vested in the circuit courts. — *Verdier v. Bignie*, S. C. Oreg., April 16, 1888; 19 Pac. Rep. 64.

141. MORTGAGE—Foreclosure—Pleading. —— A mortgage to secure the loan of school funds must be upon lands situated in the county. A complaint for the foreclosure of such a mortgage is not demurable because the land is not described in the complaint as situated in that county. A proper description may be furnished by proper averments. — *Noland v. State*, S. C. Ind., Sept. 27, 1888; 18 N. E. Rep. 26.

142. MORTGAGE— Foreclosure — Waiver. —— The acceptance by a mortgagee, after a foreclosure, of money to be applied on the mortgage debt amounts to a waiver of the foreclosure, and restores the mortgage.— *Scott v. Childs*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 206.

143. MORTGAGES — Injunction. —— A mortgagor is entitled to an injunction to restrain the mortgagee from unreasonably depositing sawdust from his mill upon the mortgaged premises, by throwing it into the stream on which the mill stands, on his own land, whereby it is floated down upon the premises below.— — *Morse v. Whitcher*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 217.

144. MUNICIPAL CORPORATIONS—Streets — Alterations. ——Under the Alabama constitution, a city is liable for damages to real estate caused by cutting down the adjacent sidewalks, which produces such a material change as could not have been reasonably foreseen at the time of the original dedication of the street, or if done merely to increase the public convenience above the ordinary standard of "useful, convenient, and safe," or for ornamentation. — *City of Montgomery v. Townsend*, S. C. Ala., July 20, 1888; 4 South. Rep. 780.

145. MUNICIPAL CORPORATIONS — Street Assessments. —— Where a city is authorized to improve a street, and all protests shall be made within ten days after a publication of the survey and estimate of costs, equity will not set aside the assessment after the work is partially done at the instance of an abutting property owner who failed to protest. — *Wright v. City of Tacoma*, S. C. Wash. Ter., Jan 27, 1888; 19 Pac. Rep. 42.

146. NEGLIGENCE—Collision—Liability.——A passenger on a train, injured by a collision with another train, may recover against the company on whose road the other train was running, its engineer having caused the accident by his negligence, though the engineer of his own train was guilty of negligence. — *Parshall v. Minneapolis, etc. R. R.*, U. S. C. C. (Minn.), June 28, 1888; 35 Fed. Rep. 649.

147. NEGLIGENCE — Contributory. —— The deceased, confused by the storm and by her umbrella, walking in haste in the darkness, failed to notice that the draw of the bridge was open and walked off and fell into the water: *Held*, that the proprietors of the bridge were not liable. — *Caron v. City of Green Bay*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 134.

148. NEGLIGENCE—Contributory — Driving Stock —— Plaintiff's stock were injured by defendant's train, while he was driving them along the right of way inside the fences to a crossing: *Held*, that he could not recover in the absence of negligence on the defendant's part. — *Davidson v. Central I. R. R.*, S. C. Iowa, Sept. 5, 1888; 39 N. W. Rep. 163.

149. NEGLIGENCE—Contributory—Jury.——Under the evidence a finding, that plaintiff was not guilty of contributory negligence was not disturbed.—*Henry v. Sioux City, etc. R. Co.*, S. C. Iowa, Sept. 7, 1888; 39 N. W. Rep. 193.

150. NEGOTIABLE INSTRUMENT—Action—Pleading.—— The code of civil procedure requires that an answer shall contain a specific denial of the material facts stated in the complaint, verified by affidavit absolute or upon information and belief. In an action on a promissory note a denial that any part of the note had been paid except two payments stated, a denial that anything is due on the note is not an allegation of payment and raises no issue.—*Stewart v. Budd*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 221.

151. NEGOTIABLE INSTRUMENT—Instruction—Partnership — Indorsement — Constitutional Law.——In an action on a negotiable note made payable to a partnership, it is not error for the court to instruct the jury that an indorsement by the firm to one of the partners passes the title to him. Under the law of California, a judge in his charge to the jury may state the testimony and must charge the law, but must not charge the jury with respect to matters of fact. Where a note is deposited for collection in a bank, an agreement by the bank to give an extension does not bind the depositor. —*Low v. Warden*, S. C. Cal., Sept. 22, 1888; 19 Pac. Rep. 235.

152. NEGOTIABLE PAPER — Protest. ——An indorser whose residence is just outside the limits of the city where the note was payable is entitled to personal notice of protest, and a drop letter containing it is not sufficient.—*Brown v. Bank of Abingdon*, S. C. App. Va., July 26, 188`; 7 S. E. Rep. 357.

153. NEW TRIAL — Notice.——Applications for new trial as of right, after the close of the term at which judgment is rendered, under Rev. Stat. Ind. 1881, § 1055, do not require any prior notice to the adverse party.— *Brown v. Cody*, S. C. Ind., Sept. 21, 1888; 18 S. E. Rep. 9.

154. PARTITION — Loss — Contribution.——Where, in partition, lots were assigned to plaintiffs, which had been already sold by their grantors, of which they were ignorant, they may maintain a bill in equity for contribution.—*Western v. Skiles*, U. S. C. C. (Mo.), Aug. 6, 1888; 35 Fed. Rep. 674.

155. PARTNERSHIP—Chattel Mortgages.——One member of a firm has authority to mortgage the chattels of the partnership to secure the payment of partnership debts.—*Hembree v. Blackburn*, S. C. Oreg., March 19, 1888; 19 Pac. Rep. 73.

156. PARTNERSHIP—Equity — Correction of Mistakes. —— In cases involving mistakes in the settlement of partnership accounts arising from an alleged want of proper diligence, the jurisdiction of equity to correct the same will, in a great measure depend upon the particular facts and circumstances.—*Powell v. Heisler*, S. C. Oreg., July 2, 1888; 19 Pac. Rep. 109.

157. PARTNERSHIP—Seal — Sealed Instrument—Collateral Attack.——Where a partner executes for the firm and in its name a sealed instrument, it will be held upon collater attack to bind the other partners, it not appearing that they did not consent to the transaction. — *Alexander v. Alexander*, S. C. App. Va., Aug. 23, 1888; 7 S. E. Rep. 335.

158. PAYMENT — Negotiable Paper — Warranty. —— Under an executory contract for the sale of property to be partially paid for by notes taken by the vendee in the course of business, there is an implied contract that the notes delivered shall be collectible. — *Russell v. Critchfield*, S. C. Iowa, Sept. 6, 1888; 39 N. W. Rep. 186.

159. PEDDLERS — Solicitors for Local Firms. —— One employed by a local firm to call on citizens and solicit orders for goods, who usually carries samples, is not a peddler under an ordinance imposing a fine for hawking and peddling goods without license, though so declared to be by it.— *City of Davenport v. Rice*, S. C. Iowa, Sept. 6, 1888; 39 N. W. Rep. 191.

160. PHYSICIANS AND SURGEONS—Constitutional Law— Statute. —— The statute of California regulating the practice of medicine and surgery, prescribing the issuance of licenses to physicians and surgeons and authorizing the revocation of such licenses for malpractice and unprofessional conduct is constitutional.— *Ex parte v. McNulty*, S. C. Cal., Sept. 28, 1888; 19 Pac. Rep. 227.

161. PLEADING—Assault and Battery.——A complaint, which alleges in the old common count an assault of defendant by one of its employes upon the plaintiff, another employee is not demurrable.— *Lewis v. Chicago, etc. R. R.*, U. S. C. C. (Minn.), June 19 1888; 35 Fed. Rep. 639.

162. PLEADINGS—Bills and Notes—Alteration. ——Defendant in his answer to a suit on a note, alleged that

plaintiff had inserted a place of payment in the note which upon its execution was left blank: *Held*, that it was error to render judgment on the note without disposing of this issue.— *Black v. DeCamp*, S. C. Iowa, Sept. 1888; 39 N. W. Rep. 215.

163. PLEADING—Demurrer—Cases of Action.——Where a petition seeks relief on account of several cases of action, but is not separated into divisions as is required, a demurrer will lie to one of the causes of action. — *Burhans v. Squires*, S. C. Iowa, Sept. 6, 1888; 39 N. W. Rep. 181.

164. PLEADING—Demurrer—Waiver.—— An objection to a complaint, that it does not state facts contributing a cause of action, is not waived by failure to demurr.— *Lyen v. Bond*, S. C. Wash. Ter., Jan. 27, 1888; 19 Pac. Rep. 35.

165. PRACTICE—Drainage—Notice. —— One who appears specially to move to set aside a petition for insufficiency waives the privilege and appears generally, if pending his first motion, he also moves that the petition be amended because it does not conform to the statute. *Gilbert v. Hall*. S. C. Ind., Sept. 28, 1888; 18 N. E. Rep. 28.

166. PRACTICE—New Trial—Evidence.——A court will not grant a new trial for newly-discovered evidence, which is simply contradictory or cumulative. — *Gilmore v. Brost*, S. C. Minn., Sept. 5, 1888; 39 N. W. Rep. 139.

167. PRACTICE—New Trial— Weight of Evidence. —— The fact that the court, if the case had been tried, without a jury, would have reached a different conclusion, is not a sufficient reason for setting aside the verdict.—*Sargent v. Home B. Ass.*, U. S. C. C. (N. Y.), May 22, 1888; 35 Fed. Rep. 711.

168. PRINCIPAL AND SURETY— Surety's Signature — Estoppel. —— When a party's name is signed as a surety to an administrator's bond without his knowledge, but before its approval he is informed thereof and makes no objection, it is too late to demand relief from liability after the administrator has committled waste. —*State v. Hill*, S. C. Ark., May 19, 1888; 8 S. W. Rep. 401.

169. PUBLIC LANDS — Boundaries — Patent. —— The survey of a tract of public land described the meander line as along the Missouri river, when in reality it was run along a bayou, some distance from the river: *Held*, that a conveyance by the government of the surveyed tract did not include the land between the bayou and the river.—*Glenn v. Jeffrey*, S. C. Iowa, Sept. 5, 1888; 39 N. W. Rep. 160.

170. PUBLIC LANDS — Fencing. —— The United States may maintain an action for inclosing public lands without claim or color of title against one inclosing the sections set apart by act of congress for school purposes in Washing Territory.—*Barkley v. U. S.*, S. C. Wash. Ter., Feb. 1, 1888; 19 Pac. Rep. 36.

171. PUBLIC LANDS—Railroads—Grants.—— Lands on odd sections within the twenty-mile limit, which had been preempted, did not pass to the O and C railroad under act of Congress of July 25, 1866. — *Brown v. Corson*, S. C. Oreg., 1888; 19 Pac. Rep. 66.

172. PUBLIC LANDS—Secretary of Interior—Review.—— When the secretary of the interior decides that public lands are held under Chippewa scrip by innocent parties in good faith, and that the locations were made in good faith, and awards the land to them. the court cannot review his action. — *Pugsley v. Brown*, U. S. C. C. (Colo.), July 23, 1888; 35 Fed. Rep. 688.

173. RAILROADS—Commissions — Appeal. —— St. 1887 does not authorize an appeal to the district court from an order of the railroad commission prescribing rates to be charged by common carriers. — *Railway T. Co. v. R. R. Commission*, S. C. Minn., Sept. 14, 1888; 39 N. W. Rep. 150.

174. RAILROADS—Municipal Aid—Township.——Where the township, in which a city is located, embraces territory not in the city, the township trustees are the proper parties to order an election to determine whether aid shall be voted to a railroad company. — *Young v. Webster City, etc. R. R.*, S. C. Iowa, Sept. 7, 1888; 39 N. W. Rep. 234.

175. RAILROADS—Passengers—Fare. —— When a railroad has failed to furnish a traveler with the opportunity to procure a ticket, and he applies for a passage, or enters the train without having a ticket, and offers the regular fare, it cannot lawfully reject of eject him.— *Poole v. North P. R. R.*, S. C. Oreg., April 30, 1888; 19 Pac. Rep. 107.

176. RAILROAD COMPANY—Highway—Penalty—Statute. ——A railroad company constructing its track across a highway is not liable for the penalty prescribed by the statute of Indiana for obstructing a highway.—*Cummins, etc. v. Evansville, etc. Co.*, S. C. Ind., Sept. 20, 1888; 18 N. E. Rep. 6.

177. RAILROAD COMPANY — Negligence — Contributory Negligence.——A track-walker of a railroad who finding a man asleep on the track wakes him up and without waiting for him to rise and get off the track walks on, is guilty of no negligence that will charge the company, although the man was killed by a train two hours afterwards.—*Virgina, etc. Co. v. Boswell's Admr.* S. C. App. Va., Feb. 17, 1887; 7 S. E. Rep. 383.

178. REMOVAL OF CAUSES—Citizenship — Intervention. —— In an action of replevin between citizens of the same State, the case is not removable because a non-resident, who sold to defendant, intervenes to protect the defendant's rights.—*Browson v. St. Croix L. Co.*, U. S. C. C. (Minn.), June 27, 1888; 35 Fed. Rep. 634.

179. REMOVAL OF CAUSES—Local Prejudice — Amount. —— A cause cannot be removed from a State to a federal court for local prejudice, unless the matter in dispute exceeds the sum of $2,000. — *Malone v. Richmond, etc. D. R. R.*, U. S. C. C. (N. Car.), Aug. 1, 1888; 35 Fed. Rep. 625.

180. REMOVAL OF CAUSES— Separable Controversy.—— A sued three corporations of different States to obtain the restoration of certain stock and other property, conveyed by his intestate to one company under a mutual mistake and now in the possession of another with knowledge of his equities: *Held*, there was no separate controversy entitling the first vendee to remove the cause to the federal court. — *Vinal v. Continental C. & I. Co.*, U. S. C. C. (N. Y.), Aug. 6, 1888; 35 Fed. Rep. 673.

181. REPLEVIN—Sale—Non-payment.——Where A has taken chattels on trial with the right to purchase upon making payment at a stated time, and fails to pay, the owner may maintain replevin without a previous demand.— *Peck v. Bonebright*, S. C. Iowa, Sept. 7, 1888; 39 N. W. Rep. 213.

182. SALE—Conditional—Record.—— Under Minnesota law, an agreement for the exchange of horses, wherein one party reserves the right to return the horse and retake his own, if the horse received has a certain disease, must be filed to be valid against creditors, *bona fide* purchaser and mortgagees. — *Kinney v. Cay* S. C. Minn., Sept. 10, 1888; 39 N. W. Rep. 140.

183. SALE—Fraud— Rescission. —— Where a person who afterwards becomes insolvent, buys goods from the plaintiff, pays for some of them and gives his notes for others, the plaintiff cannot rescind the contract and maintain replevin for the goods which are still in the hands of the purchaser while he retains the money which he has received for the goods, and this although the purchaser knew he was insolvent when he bought the goods.—*Thompson v. Peck*, S. C. Ind., Sept. 26, 1888; 18 N. E. Rep. 16.

184. SALE—Warranty — Representative. —— A salesman negotiated the sale of the stock of a corporation to A with a view of procuring a larger salary. A had prior thereto been called in by defendant to advise as to the management of the business, and knew that the latter was dissatisfied. Defendant, acting in good faith, said, that the dividends had been earned, as the salesman declared: *Held*, that A could not recover for the breach of such representations. — *Schroeder v. Trubel*, U. S. C. C. (Conn.), July 23, 1888; 35 Fed. Rep. 652.

185. SHIPPING—Charter Party—Bill of Lading. —— As between the ship-owner and charterer shipping his own goods, the charter controls the bill of lading where there is difference between them. — *Ardan S. S. Co. v. Theband*, U. S. D. C. (N. Y.), May 29, 1888; 36 Fed. Rep. 620.

186. SHIPPING—Sea-worthiness— Presumption. —— A strong presumption of the sea worthiness of a vessel arises from a preliminary survey held by the charterer, wherein the vessel was found sea-worthy, in the absence of any evidence of concealment, latent defect, bias or fraud.—*The Piskataqua*, U. S. D. C. (N. Y.), June 16, 1888; 35 Fed. Rep. 622.

187. SPECIFIC PERFORMANCE — Concealment of Facts. ——A wrote to B offering him all the money realized over $500 if he would affect a sale of his land. A company had been organized to purchase land in the vicinity, of which B did not inform A. B obtained an agreement from A to sell the land for $500, if paid within three weeks: *Held*, that equity would not enforce performance of the contract. — *Byars v. Stubbs*, S. C. Ala., July 26, 1888; 4 South. Rep. 755.

188. SPECIFIC PERFORMANCE — Mistake. —— There being an evident misunderstanding as to the contract, specific performance was refused. — *Rushton v. Thompson*, U. S. C. C. (Neb.), June 30, 1888; 35 Fed. Rep. 635.

189. TAXATION—Sale — County. —— Taxes, accruing while the county was unorganized and attached to another county, are payable to the treasurer of the old county, and a sale thereof by the treasurer of the new county is void.—*Collins v. Storm*, S. C. Iowa, Sept. 6, 1888; 39 N. W. Rep. 161.

190. TAXATION— Tax deed — Redemption. —— Construction of the Iowa law concerning tax-sales and redemptions.—*Lynn v. Morse*, S. C. Iowa, Sept. 6, 1888; 39 N. W. Rep. 203.

191. TURNPIKES—Toll Roads— Highways.——Circumstances stated under which it was held that a turnpike and toll road company had abandoned the road; and although the commissioner's ruling to that effect was not judicial it would nevertheless be sustained. — *Western, etc. Co. v. Central, etc. Co.*, S. C. Ind., Sept. 26, 1888; 18 N. E. Rep. 14.

192. VENDOR AND VENDEE—Possession—Notice.—— A tenant in common purchased his co-tenant's interest in the land, but failed to record the deed till after the sale of the latter's interest on execution. At the time he received the deed he was in possession and afterwards made improvements on the land, but the execution creditor did not know that they were made exclusively by him: *Held*, that his possession was not notice of his rights under the deed. — *May v. Sturdivant*, S. C. Iowa, Sept. 7, 1888; 39 N. W. Rep. 221.

193. VENUE— Civil Actions — Executors and Administrators. —— An action against an administrator to set aside a judicial sale of a share of the land of his intestate and revest the title thereof in the original owners, is a suit involving the title to real estate and under the code must be tried in the county in which the land or part of it lies. — *Sloss v. De Toro*, S. C. Cal., Sept. 26, 1888; 19 Pac. Rep. 233.

194. WATER AND WATER COURSES — Surface Water — Railroad Company.——The water which in flood times overflows from a river and submerges adjoining low lands is not surface water in such a sense as to relieve a railroad company from liability for obstructing it. — *Moore v. Chicago, etc. Co.*, S. C. Iowa, Sept. 10, 1888; 39 N. W. Rep. 390.

195. WILL—Construction — After-born Children. —— Where a testator by his will gave to his daughter and her children, free from control of her husband, a tract of land and at the death of the testator she had no children: *Held*, that her children born after that event took no interest in the land which had vested in fee in their mother upon the death of her father. — *Lofton v. Murchison*, S. C. Ga., July 11, 1888; 7 S. E. Rep. 322.

196. WILL—Construction—Rule in Shelley's Case.—— Where by a will property is given to a married daughter for life and after her death to the "heirs of her body," these words are held to be in the absence of any statutory provision words of limitation and not of purchase, and consequently the daughter took a fee-simple at the death of her father.—*Wilkerson v. Clark*, S. C. Ga., July 11, 1888; 7 S. E. Rep. 319.

197. WILL—Contest— Descent and Distribution. —— The law of New Hampshire provides that a child of a testator living at the time of testator's death who is not named in the will takes the same share of his father's estate that he would have taken if his father died intestate; such a child cannot contest the validity of the will, having no interest in it or under it.—*McInter v. McIntire*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 218.

198. WILL—Undue Influence. —— The evidence was held not sufficient to require the issue of undue influence on the part of the wife to be submitted to the jury. — *Stockton v. Thorn*, S. C. Minn., Sept. 10, 1888; 39 N. W. Rep. 143.

199. WILL—Undue Influence. —— Upon the question of undue influence or testamentary capacity, evidence of the relations between the testator and the legatee is admissible. That an executor has himself written a codicil executed by the testator which inmures solely to the benefit of the executor creates no presumption in law or equity of undue influence over the testator. The question is one for the jury.— *Carpenter v. Hatch*, S. C. N. H., July 19, 1888; 13 Atl. Rep. 219.

200. WRIT OF ERROR—Ejectment — Equity.——A writ of error will not be entertained by the supreme court, in an ejectment case tried as a case in equity, where the verdict of the jury consisting of answers to interrogatories had been entered but no judgment upon it rendered by the court.—*McGowan v. Lufburrow*, S. C. Ga., July 11, 7 S. E. Rep. 314.

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QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES ANSWERED.

QUERY No. 11 [*27 Cent. L. J. 396*].

A wife, in Nebraska, obtains a divorce from her husband for cruel treatment, also a decree for alimony, in which the court decrees to her *all* the personal and real property of the husband. She is the second wife of this husband, with one child. This husband has minor children by his first wife, living and residing with him at the time of the divorce and alimony decree. On an action of replevin by the wife to obtain possession of the personal property (household goods, etc.) of the husband, the husband claims as the head of a family his legal exemptions, under the State law. Can he maintain and sustain his claim successfully? Cite authorities. TAC.

Answer.—Since such exemptions are intended partly for the wife and children, and the statute expressly authorizes the court to grant her such part of the personal estate and such alimony out of his real estate as it may deem proper, the power of the court to award her all of his property would no doubt be sustained. But while conceding the power, the supreme court would set aside the decree as excessive. McConahey v. McConahey, 21 Neb. 463. The husband, however, can defeat the replevin suit, because the wife has pursued the wrong remedy. The court granting the decree can, upon petition for disobedience, sequester the husband's personalty and appoint a receiver to collect the rents of his realty. It has been decided that the court cannot decree a conveyance of his realty, nor even make the judgment a lien thereon. Swansen v. Swansen, 12 Neb. 212; Brotherton v. Brotherton, 14 Neb. 186; Ellis v. Ellis, 13 Neb. 95. These decisions seem to be based on the idea that the statute provides the mode for enforcing such decrees, and such mode must be followed. If it is too late to appeal the husband can petition the court to modify its decree, and it seems as though he can appeal from the action of the court on his petition and have the decision reviewed on the question of alimony. O'Brien v. O'Brien, 19 Neb. 584. M. S.

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A TREATISE ON THE LAW OF MORTGAGES ON PERSONAL PROPERTY. By Leonard A Jones, Author of Treatises on "Mortgages," "Railroad Securities," "Pledges," and "Liens." Third Edition, Revised and Enlarged. Boston: Houghton, Mifflin and Company. New York: 11 East Seventeenth Street. The Riverside Press, Cambridge, 1888.

We have now before us the third edition of a work of great practical value by an author of well established reputation. There is scarcely a subject within the whole scope of the law which so frequently comes before the courts as the law relating to chattel mortgages, and in all the States it has been the subject of most extensive and varied legislation. Litigation concerning it increases yearly, and one can hardly open a late report or "Reporter" without finding among the very first cases he encounters some new phase of the principles governing chattel mortgages or new applications of those principles. The infinite variety of property which may be affected by mortgages of this description would seem to make any intelligible classification almost impossible, and we can hardly sufficiently admire the care and skill with which Mr. Jones has systematized the law on this infinite variety of subjects. His arranagement is thorough and complete and the very large number of citations found in his table of cases bears witness to the care and diligence of his investigations. The work is gotten out in the best style of the well known "Riverside Press," and of course needs no eulogium on its typography, and for the rest we can sincerely commend the work to the working members of the profession as worthy of their highest favor.